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Supreme Court of the United States

October Term, 1974

No. _____

STATE OF OHIO,
Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Tenth Circuit

Petitioner the State of Ohio respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 13, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix at p. A1. The opinion of the District Court for the Western District of Oklahoma, reported at 59 F.R.D. 667 (1973), appears in the Appendix at p. A22. The supplementing opinion of the District Court, not reported, appears in the Appendix at p. A52.[1]

1. This case is part of a complex, multidistrict action known as "Four Seasons Securities Laws Litigation, M.D.L. 55". The District Court opinion approving the settlement which Ohio has attacked is reported at 58 F.R.D. 19 and appears in the Appendix at p. A56.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does not due process under the Fifth Amendment and this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), require adequate representation of the absent members of a plaintiff class throughout an action under Rule 23(b)(3) even though notice may have been given?

2. Can the express requirement of Rule 23(a)(4) that there be fair and adequate representation of absent class members in all class actions be ignored in Rule 23(b)(3) class actions merely because of the notice and opt-out provisions in Rule 23(c)(2) in view of this Court's statement in *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 2152, (1974) that "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided"?

3. Is amalgamating the class action determination under Rule 23(c)(1) with the procedure for judicially approving a compromise under Rule 23(e) and issuing only a single combined notice under Rules 23(c)(2) and 23(e) permissible in a Rule 23(b)(3) case in view of the potentially damaging effect such telescoping has on the rights of absent class members?

4. Should not the scope of appellate review over the District Court's discretion "to vacate judgments whenever such action is appropriate to accomplish justice" under the

"'other reason' clause" of Rule 60(b)(6), *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949), be limited to correcting abuse of discretion in complicated, multidistrict, class action litigation?

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This petition for certiorari involves the due process clause of the Fifth Amendment to the United States Constitution and Rules 23 and 60 of the Federal Rules of Civil Procedure. These are set out in the Appendix at p. A99, p. A99, and p. A103 respectively.

STATEMENT OF THE CASE

In March, 1970 the State of Ohio (Ohio) lent $4,000,000 to Four Seasons Nursing Centers of America, Inc. (Four Seasons), a Delaware Corporation with its principal place of business in Oklahoma City. The loans were evidenced by three promissory notes with interest. Three months later, on June 26, 1970, Four Seasons filed a petition for reorganization under Chapter X of the Bankruptcy Act.

Ohio has persistently pursued every avenue by which it might recover its loans. It filed a claim for $4,111,000 in the reorganization. It sought reclamation of the proceeds of its loans in the reorganization court and appealed the denial of its reclamation petition.[2] App. pp. A25-A26; 59 F.R.D. at 670-671. As an ordinary creditor (Class C), Ohio consistently objected to the inclusion of creditor-stockholders (Class G) in the plan of reorganization and

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2. The Tenth Circuit's opinion affirming the denial of the reclamation petition is reported at 465 F.2d 25 (1972).

filed three separate appeals challenging the plan so drafted.[3] App. p. A28; 59 F.R.D. at 671-672.

Thus, a conflict of position between Ohio and the creditor-stockholders was early manifest. Certain of these creditor-stockholders and other security holders filed several lawsuits as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure against the former officers, directors, accountants, and investment bankers of Four Seasons. App. p. A57; 58 F.R.D. at 21. These cases, which were later designated as class actions (App. p. A80; 58 F.R.D. at 32), are the subject of this petition.

Jurisdiction was based on the Securities Act of 1933, §22(a), the Securities Exchange Act of 1934, §27, and pendent jurisdiction. In May, 1971 ten actions were consolidated for pretrial proceedings in the Western District of Oklahoma and assigned to Senior District Judge Roszel C. Thomsen of Baltimore by order of the Judicial Panel on Multidistrict Litigation. 328 F. Supp. 221. This conglomerate became "M.D.L. 35". Many additional cases were later transferred to it.

In March, 1972 Ohio filed three cases of its own arising out of its loans to Four Seasons. One was *State of Ohio v. Crofters, Inc. et al.*, No. 72-81, in the United States District Court for the Southern District of Ohio. The other two cases were in the state court. In *Crofters* Ohio alleged that its loans to Four Seasons were procured in violation of federal and state securities laws and by common law fraud. Jurisdiction was also based on the Securities Act of 1933, §22(a), the Securities Exchange Act of 1934, §27, and pendent jurisdiction. The defen-

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3. In contrast, Fink, one of the named plaintiffs and representatives, also attacked the reorganization plan by an appeal, but on the ground that it was too generous to ordinary creditors (Class C), such as Ohio.

dants in Ohio's action included several former officers and directors of Four Seasons who were also defendants in M.D.L. 55, as well as agents and others associated in the procurement of the Ohio loans. App. p. A29; 59 F.R.D. at 672-673. Ohio's action was transferred to M.D.L. 55 but not until July 17, 1973 (361 F. Supp. 636), approximately a year after the events described below.

On July 20, 1972, after extensive hearings, Judge Thomsen announced that he was ready to designate five actions as class actions and define tentatively two plaintiff classes. App. pp. A31, A76-A77; 59 F.R.D. at 673; 58 F.R.D. at 30. Ohio, which had not participated in any M.D.L. 55 proceedings, was not present at the July, 1972 hearings. App. p. A7. No notice had been sent to any absent member of the purported classes up to that time, and none was sent until after September 21, 1972. App. pp. A79-A80; 58 F.R.D. at 32. Upon Judge Thomsen's announcement, all counsel present asked the court to defer any determination of the classes so that the parties could continue settlement negotiations. The judge acceded. App. p. A32; 59 F.R.D. at 674.

The period from July 20 to September 21, 1972 proved critical to Ohio's interests. At that time, the self-appointed representatives, who were all beneficiaries of the reorganization plan which Ohio was challenging in its appeals, were negotiating a settlement which had serious side effects for Ohio, such as: (1) discounting Ohio's federal and state securities claims by 90% while valuing their own claims at 100%; (2) ignoring Ohio's special claim for interest; (3) rejecting Ohio's claim for punitive damages; and (4) expressly reserving all rights, claims, and causes of action of the M.D.L. 55 defendants against Ohio. App. pp. A79-A85, A48-A51; 58 F.R.D. at 32-35; 59 F.R.D. at 682-683.

On September 21, 1972 the proposed settlement was presented to Judge Thomsen by counsel in M.D.L. 55. The order entered that day preliminarily approved the proposed settlement and directed that notice be sent to members of the two plaintiff classes described. The definition of one class encompassed Ohio. App. p. A9. The order, with many exhibits, included the form of notice contemplated by Rule 23(c)(2). App. p. A44, n.15; 59 F.R.D. at 679, n.15. Ohio received two copies of the order by registered mail at the Office of the Attorney General, one on October 6, 1972 and the other on October 10, 1972. Notice of the proposed settlement was also published in The Wall Street Journal. App. p. A35; 59 F.R.D. at 675. No one for Ohio read either the copies of the notice received by the Attorney General's Office or the published notice at that time. App. pp. A35, A42-A43; 59 F.R.D. at 675, 679.

From July 20 to September 22, 1972, Ohio was separately negotiating with the Trustee and his counsel to settle Ohio's three appeals on the plan of reorganization and its allocation of shares in the reorganized company to creditor-stockholders. App. pp. A31-A33; 59 F.R.D. at 672-673. Throughout its negotiations before and after September 22, 1972 with the Trustee and his counsel, as well as in the discussions which Ohio's assistant attorneys general had with counsel for some of the M.D.L. 55 defendants, Ohio acted "in the belief that Ohio would not be included in the M.D.L. 55 classes." The District Court so found. App. p. A42; 59 F.R.D. at 678-679. While rejecting any criticism of counsel for the M.D.L. 55 defendants or the Trustee, the District Court also found that the course of dealings from July 20 through September 22, 1972 "lulled Ohio's attorneys into the belief that the statement made to them [on September 22 by counsel for the Trustee] 'that the case had been

settled around Ohio' meant that Ohio was not involved in the M.D.L. 55 settlement." App. p. A42; 59 F.R.D. at 679.[4]

Ohio first read the whole order of September 21, 1972 about December 5th after being alerted by statements of counsel for one of the M.D.L. 55 defendants at a pretrial hearing in the *Crofters* case. Ohio's motion for relief from judgment under subdivisions (1), (4), and (6) of Rule 60(b) was promptly filed with Judge Thomsen in Baltimore on December 21, 1972. App. p. A38; 59 F.R.D. at 677.

After depositions by both sides, two oral arguments, and extensive briefs, the District Court granted Ohio's motion on the "other reason" ground of Rule 60(b)(6). App. pp. A53-A54. Having stated that "Ohio has made a strong case that the judgment should be held void as to all the claims of Ohio," Judge Thomsen continued:

> To the considerations referred to in the last preceding paragraph must be added the chilling effect of the dealings which the attorneys for Ohio had with the attorney for the Chapter X Trustee and the attorneys for some of the M.D.L. 55 defendants, discussed under the heading "60(b)(1)—Excusable Neglect", above.

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4. In 1972 two assistant attorneys general for Ohio were in charge of Ohio's claims arising out of its loans to Four Seasons. The first was Anthony L. Gretick who left the Office of the Attorney General on or about October 26. He saw a copy of the order at the office of counsel for the Trustee in mid-October, "riffled" through the pages, and asked that a copy be sent to him, "which was not sent". App. p. A42; 59 F.R.D. at 679. The second was Ronald B. Brown who was designated lead counsel on Mr. Gretick's departure. Mr. Brown saw a copy of the order in his office in late October while examining the many papers he inherited from Mr. Gretick. Mr. Brown read the first page of the order, "thumbed through some additional pages", and assumed Mr. Gretick had done what was necessary in view of its being over a month old. App. p. A35; 59 F.R.D. at 675.

> The court concludes that the totality of the evidence requires that Ohio be relieved from the operation of the judgment. App. p. A51; 59 F.R.D. at 683.

The Tenth Circuit reversed Judge Thomsen's grant of relief to Ohio and ordered the judgment reinstated.

REASONS FOR GRANTING WRIT

1. The Tenth Circuit Refused to Follow the Rule of Hansberry v. Lee, 311 U.S. 32 (1940), That Due Process of Law in Class Actions Requires Adequate Representation of Absent Class Members.

The Tenth Circuit specifically rejected *Hansberry* as either governing or guiding authority. After acknowledging *Hansberry* as "the landmark due process decision in class action law," the appellate court departed from the existing authorities,[5] which interpret the decision "to establish adequate representation as a prerequisite for due process in class actions." App. p. A17, n.8. Ultimately the Tenth Circuit cut itself completely free from *Hansberry* and stated that:

> While adequacy of representation has been upheld as an extremely important factor in due process considerations in class actions and has, in fact, been deemed a prerequisite thereto under most circumstances, *we do not feel bound in the instant proceeding by Hansberry and its progeny*. . . . App. p. A18 (emphasis added).

From there it was an easy step to the conclusion "that due process may be satisfied by notice alone and that, where

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5. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §1765, p. 618 (1972) and cases cited therein.

due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity." App. p. A19.

In *Hansberry*, this Court determined that persons seeking to enforce a restrictive covenant could not and did not adequately represent those opposed to its enforcement and that there could be no proper class consisting of both. *Id.* at 44. The Court then concluded (1) that a prior judgment could not be res judicata as to the petitioners in *Hansberry* because they had not been adequately represented in the original action, and (2) that the petitioners had been denied due process in the court below. *Id.* at 44-46. The Court recognized that absent class members ". . . may be bound by the judgment where they are in fact adequately represented by parties who are present. . . ." *Id.* at 42-43. But the Court then held that ". . . a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45.

In discussing Ohio's motion under Rule 60(b)(4), the District Court properly applied and followed the rule that due process in class actions requires adequate representation of absent class members:

> But where a party has not appeared, although he has received due notice, the judgment will not be binding upon him unless he has had representation which meets the tests of Rule 23(a)(3) and (4), quoted above. Adequacy of representation cannot take the place of notice;[6] nor can notice take the place of

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6. As this Court recently held in *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 2152 (1974).

adequacy of representation. App. p. A44; 59 F.R.D. at 680.

Even though the District Court granted Ohio's motion on the "other reason" ground set out in Rule 60(b)(6), rather than the voidness ground in (b)(4), it repeatedly stated that Ohio had "made a strong case that the judgment should be held void as to all the claims of Ohio."[7] App. pp. A51, A53, A54; 59 F.R.D. at 683.

In addition to not feeling bound by *Hansberry*, the Tenth Circuit justified its rejection of adequate representation as a constitutional requirement for due process in this case in order "to prevent one-way intervention". App. p. A19. Yet, the court failed to explain how the circumspect exercise of judicial discretion under Rule 60(b)(6) to relieve one party[8]—Ohio—from one class action judgment could constitute "'a return to one-way intervention under a new guise.'" *Id.* This prediction is baffling since the District Court found that the attorneys for the Trustee and the M.D.L. 55 parties "assumed that Ohio would opt out when it received the notice" (App. p. A34; 59 F.R.D. at 675) and Ohio had had the right under Rule 23(c)(2) unilaterally to opt out at an earlier point.

In other words, the granting of Ohio's motion under Rule 60(b) put the parties exactly where they thought they would be when they negotiated the settlement. Ohio was merely permitted to exercise its right to opt out after the date fixed by the September 21st order.

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7. The Tenth Circuit assumed "the conclusion of the court below on the adequacy question to be correct. . . ." App. p. A16.

8. Motions also under Rule 60(b) were denied by Judge Thomsen to movants Kleinman and Phillips. 60 F.R.D. 598 (1973); M.D.L. 55, Opinion No. 8 (July 10, 1974).

The District Court correctly recognized the constitutional due process requirement of both notice and adequate representation to bind absent class members and properly applied the *Hansberry* principle in a Rule 23(b)(3) class action. On the other hand, the Tenth Circuit was wrong not only in concluding that adequate representation could be dispensed with if there was notice but also in ignoring the mandate of *Hansberry* in so doing. In light of the damage this precedent could cause absent class members in Rule 23(b)(3) actions, a writ of certiorari should issue to correct the appellate court's error.

2. The Decision Below Conflicts in Principle With a 1973 Decision of the Fifth Circuit.

The Fifth Circuit, in a class action under Rule 23(b)(2), recently applied the *Hansberry* rule that due process requires adequate representation of absent class members throughout all stages of the case. *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). In that case, the named plaintiff sought to enjoin enforcement of a Texas statute providing for automatic suspension of the driver's license and motor vehicle registration receipt of any uninsured motorist involved in an accident who did not post security. The District Court held that res judicata barred the named plaintiff and the class in their claim for retroactive application of the declaration of the statute's unconstitutionality because they had been members of an identical class in a prior action. Only prospective relief had been granted to the class in the earlier case although the named plaintiff had obtained retroactive relief for himself but did not appeal to secure the same relief for the class.

The Fifth Circuit reversed because inadequate representation of absent class members in the earlier case had

denied them due process, citing *Hansberry* and other cases. *Id.* at 74-75. In refusing to apply res judicata, the court of appeals held that "[d]ue process of law would be violated . . . unless the court . . . can conclude that the class was adequately represented in the first suit." *Id.* at 74. The court made it clear that *Gonzales* was not precluded from raising the adequate representation issue because his attorney "was aware" of the proceedings and judgment in the earlier class action. *Id.* at 76. In noting that Rule 23 (a) (4) must be "stringently applied", the court observed that

> The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his responsibility—it is the responsibility of the class representative to protect the interests of all class members. *Id.* at 76.

In this case, the Tenth Circuit attempted to distinguish *Gonzales* on the ground that *Gonzales* was not under Rule 23(b)(3) but Rule 23(b)(2) which is not subject to an express notice or opt-out provision. It stressed that Ohio had been given the benefit of these provisions but completely failed to address the point that Ohio was represented in the settlement by persons with adverse interests. App. p. A17, n.9.

By concluding that mandatory notice to class members under Rule 23(c)(2) in a (b)(3) class action is sufficient—by itself—to satisfy the requirements of due process, the Tenth Circuit overlooked the substantial authority that adequate representation is equally, if not more, important in Rule 23(b)(3) actions than in other class actions. This stems from the lack of any ongoing relationship or true

identity of interest among members of a (b)(3) class, which tends to assure adequacy of representation in (b)(1) and (b)(2) cases. Indeed, the Fifth Circuit had recognized this by citing (b)(3) cases in support of its conclusion on the importance of adequate representation. *Gonzales v. Cassidy, supra,* text at 75, n.15.[9]

Ohio's case is a fortiori to *Gonzales* which involved a collateral attack based on inadequacy of representation whereas Ohio was granted relief on a direct attack under Rule 60(b). When Ohio's Rule 60(b) motion was filed, Judge Thomsen had already lived with M.D.L. 55 for 19 months. In referring to the "strong case" Ohio had made for voidness of the judgment as to it, Judge Thomsen implicitly recognized that continuing adequate representation, in addition to notice, is necessary throughout a Rule 23(b)(3) class action and that the *Gonzales* insistence on such representation is not to be confined narrowly to Rule 23(b)(2) cases.

The Tenth Circuit expressed concern for the stability of judgments in class actions in reversing the District Court. In contrast, the Fifth Circuit, in *Gonzales,* imposed a continuing duty on the district judge to make certain that absent class members are adequately represented throughout the action. The approach of the Fifth Circuit is a fairer and more positive way of achieving binding judgments. Only this Court can resolve the conflict in principle between these circuits.

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9. The Fifth Circuit cited *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded,* 94 S.Ct. 2140 (1974); *Hohmann v. Packard Inst.,* 43 F.R.D. 192, 196 (N.D. Ill. 1967), *rev'd on other grounds,* 399 F.2d 711 (7th Cir. 1968), and *Fischer v. Kletz,* 41 F.R.D. 377, 382 (S.D.N.Y. 1966).

3. The Number and Size of Rule 23(b)(3) Class Actions Require a Definitive Determination of the Interrelationship Between the Fair and Adequate Representation Necessary Under Rule 23(a)(4) and Notice Under Rule 23(c)(2).

In view of the complexity and popularity of Rule 23 (b) (3) class actions since the 1966 amendment of the rule, numerous questions concerning the definition and application of the various provisions of Rule 23 have inevitably confronted the lower federal courts. This Court provided considerable guidance in *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140 (1974). This case offers an excellent opportunity for the Court to shed light on another important aspect of the operation of Rule 23—the relationship between the requirement of fair and adequate representation of Rule 23(a)(4) and the notice requirement of Rule 23(c)(2).

In *Eisen*, also a Rule 23(b)(3) case, the Court held that adequate representation was not a substitute for notice. *Supra* at 2152. In this case, the Court has before it the converse question of whether notice is a substitute for adequate representation.

Pre-*Eisen*, Judge Thomsen held that "notice [cannot] take the place of adequacy of representation." App. p. A44; 59 F.R.D. at 680. Post-*Eisen*, the Tenth Circuit asserted that the interrelationship of notice and adequate representation "has never been completely and clearly articulated." App. p. A16. This is a curious assertion to be made after this Court's flat statement that "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *Eisen v. Carlisle & Jacquelin, supra* at 2152. In light of this language in *Eisen* and the explicit

language of Rule 23(a)(4), it is even more perplexing that the court below concluded that only notice was required in this case. App. p. A19.

Moreover, the plain language of Rule 23(a)(4) requires fair and adequate representation in every class action and the Advisory Committee's note describes this as a "necessary" condition for "any class action." 39 F.R.D. at 100. In *Eisen*, this Court made it clear that class action prerequisites cannot be ignored on a random basis: "[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." *Supra* at 2152. Contrary to the clear import of this passage on construing Rule 23, the Tenth Circuit has effectively read (a)(4) out of Rule 23 and established a precedent which will surely undermine the adequacy requirement unless this Court takes corrective action.

4. This Court Should Halt the Practice in Rule 23(b)(3) Class Actions of Postponing the Class Determination Under Rule 23(c)(1) Until a Settlement Is Proposed and Then Giving a Single Combined Notice Under Rules 23(c)(2) and 23(e).

M.D.L. 55 was pending for 14 months before the District Court indicated its readiness to determine whether the actions could be maintained as class actions. Even then, the trial court permitted unsupervised settlement negotiations to continue for 2 more months among the parties to M.D.L. 55, all of whose interests were antagonistic to Ohio. Only after a proposed settlement was reached by them were the class action determinations under Rule 23(c)(1) made and the classes defined. As a result only a single combined notice was sent out despite the discrete requirements of Rules 23(c)(2) and 23(e).

This notice advised those who received it of (1) their option to be excluded from the class or classes upon timely request, (2) their necessary inclusion in any judgment rendered absent an opt-out request, and (3) their right to appear by personal counsel. By combining what should have been separate notices, the right to enter an appearance was reduced to the right to be heard on the approval of the proposed settlement, the distribution of the settlement fund, the allowance of legal fees and similar matters. Basic questions such as whether the requirements of Rules 23(a) and (b) had been met and the definition of the classes under Rule 23(c)(1) were simply not on the agenda. As a result of the pressure for settlement put on Judge Thomsen at the July, 1972 hearings, there never was any real inquiry into the coextensiveness of interests or hostility between the named plaintiffs and potential class members, the capacity of the named plaintiffs to provide adequate representation for Ohio's interests, and the need to create a subclass under Rule 23(c)(4). This surely compromised the protective scheme built into the requirements of Rule 23.

In reversing the grant of relief, the Tenth Circuit apparently endorsed the practice of postponing the class action determination until a settlement has been reached and then giving a single combined notice of both. App. p. A18. This practice is condemned by the 1973 edition of the *Manual for Complex Litigation*.

The *Manual* warns against premature settlement negotiations before the class action determination has been made:

> Before any settlement negotiations occur, there should be a class action determination. Thereafter, all settlement negotiations on behalf of the class should be

conducted by counsel representing the class in the litigation. *Id.* at 24.

It lists nine reasons why "tentative classes for the purpose of settlement . . . should never be formed." Six of them are especially relevant to this case:

> (1) Rule 23 does not authorize formation of tentative classes for the purpose of settlement.
>
> (2) There can be no assurance that the class members will be adequately represented in the settlement negotiations until the findings which are condition precedent to the formation of a class are made by the court after an opportunity for an evidentiary hearing. Formation of a tentative class for the purpose of settlement with a requirement that the class member accept the settlement or opt out and litigate independently denies to the members of the class the opportunity to show the inadequacy of the representation of the class by the representative party or parties agreeing to the settlement and their counsel.
>
> (3) The appropriate membership of the class and the identity of the members cannot be determined in the absence of an opportunity for hearing and judicial findings of fact and conclusions of law. Nor can there be any assurance that the tentative class will be composed of interests which are not conflicting. . . .
>
> (4) In the absence of the development of the information relevant to liability, damages, and the expense of preparation for trial and of trial, there cannot be a fair recognition in settlement negotiations of the potential liability of the party or parties opposing the class and the potential damages that might be recovered for the class.

* * * * *

(6) The formation of a tentative class for the purpose of settlement denies to the class member the choice contemplated by amended Rule 23 to become a member of the proposed class for the purpose of litigation with adequate representation as a member of a litigating class.

(7) Formation of such a class denies to a member of the class the right to appear in the action as a party and to maintain the position of a litigating party. *Id.* at 24-25.

Moreover, the *Manual* advocates that the two separate notices be given as required by the Rule, one under 23(c)(2) and one under 23(e). *Id.* at 22.

This Court should give the federal courts much needed guidance in administering the Rule 23(c)(1) class action determination, the timing of the Rule 23(c)(2) notice, the conduct of settlement negotiations, and the approval of settlements under Rule 23(e). Otherwise, the understandable desire, sometimes dictated by expediency, to bring class actions to an early termination by settlement will continue to encourage federal judges to permit the short-circuiting of fundamental rights seen here.

5. The Tenth Circuit Exceeded the Proper Scope of Appellate Review and Undercut the Trial Court's Discretion to Grant Relief Under Rule 60(b) from a Judgment in a Class Action.

Rule 60(b) gives a district court broad discretion to "relieve a party or his legal representative from a final judgment, order, or proceeding." *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §2857, pp. 157-

158 (1973). As this Court stated in *Klapprott v. United States*, 335 U.S. 601 (1949):

> In simple English, the language of the "other reason" clause [Rule 60(b)(6)], for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. *Id.* at 614-615.

The District Court granted Ohio relief on "the totality of the evidence" under the "other reason" clause of Rule 60(b)(6). App. p. A51; 59 F.R.D. at 683. That "the totality of the evidence" in a given case may justify the grant of relief under Rule 60(b)(6) is well established.[10]

The exceptional facts and circumstances which the District Court emphasized in granting Ohio relief on "the totality of the evidence" were: (1) "none of the class representatives had been a Class C Creditor in the Chapter X proceedings"; (2) "the differences between the claims of Ohio and other class members"; (3) "the provisions of the order and judgment dealing specifically with the Ohio and Ohio-related claims" and (4) "the lulling effect of the dealings which the attorneys for Ohio had with the attorney for the Chapter X Trustee and the attorneys for some of the M.D.L. 55 defendants". App. pp. A49-A50, A51; 59 F.R.D. at 682, 683. Moreover, Judge Thomsen found that "Ohio has made a strong case that the judgment

---

10. The Tenth Circuit upheld Judge Thomsen's conclusion on this point. App. pp. A14-A15. *See, e.g., Klapprott v. United States, supra* at 613-615; *Bibeau v. Northeast Airlines, Inc.*, 429 F.2d 212, 214 (D.C. Cir. 1970); *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5, 8 (5th Cir. 1970); *Hutton v. Fisher*, 359 F.2d 913, 916 (3d Cir. 1966); *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir. 1965); *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963); *Rooks v. American Brass Co.*, 263 F.2d 166, 168 (6th Cir. 1959).

should be held void as to all the claims of Ohio" in his initial opinion (App. p. A51; 59 F.R.D. at 683), restated that view in his supplementing opinion (App. p. A53), and adhered to that position in the judgment (App. p. A54). But he ultimately concluded that his grant of relief on "ground (6) of Rule 60(b)" made "it unnecessary for the Court to decide whether relief should be granted under ground (4) of Rule 60(b)". *Id.*

Despite the District Court's unambiguous statement that relief was granted under Rule 60(b)(6), the Tenth Circuit thought it desirable to recount "the lower court's decisional process . . . in order to demonstrate that the court did not pigeonhole its basis for relief into any particular one of the Rule 60(b) categories." App. p. A14. It then rejected the District Court's own statement and concluded, in an extraordinary excursion into extrasensory perception, that "the real basis for the court's decision below . . . was its belief that under all of the circumstances presented Ohio was simply denied due process of law." App. p. A15.

The net effect of this tour de force was that the Tenth Circuit substituted its judgment on the facts for that of the District Court. The Tenth Circuit felt that it could decide on appeal "whether, under all of the circumstances, the relief granted was justified." App. p. A14. This clearly was improper. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 495 (1950).

In reviewing a grant of relief under Rule 60(b), the scope of proper "[a]ppellate review is limited to determining whether the district court abused its discretion." 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §2857, p. 158 (1973). An appellate court "will not set

aside the district court's exercise of discretion unless it is persuaded that under the circumstances of the particular case the action of the district court is an abuse of discretion." *Id.* at §2872, p. 261. This standard for appellate review of decisions on Rule 60(b) motions has been recognized by the courts in the nine circuits which have considered the matter, including the Tenth Circuit[11] (except in this case). Here, the Tenth Circuit did not even mention abuse of discretion, let alone apply the established standard in measuring it. Instead it simply ignored any element of discretion which the trial court properly had in considering a motion under Rule 60(b).

The unique expertise of the District Court in this case graphically demonstrates the importance of adhering to the proper scope of appellate review. This was a consolidated, multidistrict action over which Judge Thomsen had presided for 19 months at the time Ohio filed its motion. This experience gave him a familiarity with M.D.L. 55 which fully qualified him to decide Ohio's motion and disqualified the Tenth Circuit from superimposing its own views in areas of trial court discretion. The development of competence in a transferee judge to insure the proper management of complex litigation is the very genius of proceedings under 28 U.S.C. §1407; similarly, the application of a trial judge's special expertise is the essence of Rule 60(b). Neither should be sacrificed to ad hoc intrusions by a court of appeals in the absence of an abuse of discretion by a district court.

The Tenth Circuit so far departed from the accepted and usual course of appellate review as to justify this

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11. *Nichols v. United States*, 460 F.2d 671, 675 (10th Cir. 1972), *cert. denied*, 409 U.S. 966 (1972). See 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §2872, pp. 261-262, n.6, Supp. p. 8 (1973) and cases cited therein.

Court in exercising its supervisory role over the lower federal courts, thereby insuring the effectiveness of 28 U.S.C. §1407, Rule 23, and Rule 60(b).

CONCLUSION

Any notion that the granting of Rule 60(b) relief from judgment in a proper case undermines class actions is specious. Rule 60(b) provides protection for, not erosion of, class action judgments. The stability of such judgments can best be achieved by this Court's directing trial judges to assure adequate representation of absent class members throughout all stages of all class actions. This will preclude later collateral attack. More fundamentally, it will assure all absent class members due process of law whether the case is fully litigated or terminated by settlement.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1974

No. 74-3791

STATE OF OHIO,
Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Tenth Circuit

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OPINION OF THE TENTH CIRCUIT COURT OF APPEALS

(Filed August 13, 1974)

Nos. 73-1781, 73-1782, 73-1783, 73-1784

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

Appeals of:
ARTHUR ANDERSEN & CO.; JACK L. CLARK; GORDON H. McCOLLUM; WALSTON & CO., INC.; MONTGOMERY CO., and GLENN R. MILLER,
Appellants,

vs.

STATE OF OHIO,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(M.D.L. 55)

Before LEWIS, *Chief Judge,* McWILLIAMS and BARRETT, *Circuit Judges.*

LEWIS, *Chief Judge.*

This appeal probes the interrelationship between Rule 23 class actions and Rule 60 relief from judgments. It follows the granting of such relief to the state of Ohio

after the judgment on a class-action settlement and arises as yet another offshoot of the complex litigational network that has been constructed around securities issued or guaranteed by Four Seasons Nursing Centers of America, Inc. or Four Seasons Equity Corporation.[1] The transactions relevant here involve $4,000,000 in loans made by Ohio to Four Seasons Nursing Centers of America. The facts surrounding the execution of these loans are set out in *Ohio v. Four Seasons Nursing Centers of America,* 10 Cir., 465 F.2d 25, at 26, 27 as follows:

> In early 1970, Mr. Jack L. Clark, the president of Four Seasons, received information that a Mr. Ronald R. Howard of Los Angeles, California, was in a position to assist Four Seasons in borrowing needed funds for continued operation and expansion. Howard and Clark conferred in Oklahoma City for the purpose of consummating an agreement for the procurement of funds. It was anticipated that Four Seasons would borrow between $20,000,000 and $24,000,000 from the State of Ohio. Howard contacted Crofters, Inc., a Columbus, Ohio, investment firm. Mr. Harry A. Groban, the executive vice president of Crofters, requested a credit rating on Four Seasons from the National Credit Office, a division of Dun and Bradstreet. An employee of the National Credit Office procured the latest annual report of Four Seasons, as well as other statements and bank information concerning that corporation from Mr. John Mee, a vice president of and attorney for Four Seasons. Based on this material, the National Credit Office gave Four Seasons a rating of "prime" for commercial paper.

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1. For a thorough account of the history of the Four Seasons companies *see* In re Four Seasons Securities Law Litigation (Opinion No. 2), (W.D. Okla.) 58 F.R.D. 19.

This information was communicated by letter to Groban; Groban in turn furnished the information to Mr. Robert F. Gardner, Deputy Treasurer of the State of Ohio.

Groban advised Mee that funds would be available to Four Seasons from the State of Ohio. Thereafter, Mr. Alex Russell, an officer of Four Seasons, went to Columbus, Ohio, to secure the funds. On March 9, 1970, Russell consummated a loan of $3,000,000 for Four Seasons with the State of Ohio through Gardner and in the presence of Groban. The loan was evidenced by two promissory notes of Four Seasons, one for $2,000,000 payable in 120 days and another for $1,000,000 due in two years. The $2,000,000 note was made on the basis of 120 days with the understanding that when due the note would be renewed for a period of two years. A second loan for $1,000,000 was advanced on March 23, 1970; a note for $1,000,000 payable in two years to the State of Ohio was executed on that date.

Ohio subsequently sought reclamation of these funds against the Trustee in the Chapter X reorganization proceedings of the Four Seasons companies. It charged, *inter alia*, that Four Seasons had intentionally made material and fraudulent misrepresentations concerning its financial condition to the National Credit Office in order to obtain a prime rating, and that Ohio's loans had been made in reliance on this rating. The trial court found neither fraud nor misrepresentation, *In re Four Seasons Nursing Centers of America*, W.D. Okla., 329 F. Supp. 647, and was upheld on appeal. The appellate court also found Ohio's constructive trust argument unpersuasive and held that the evidence concerning procurement of the funds did not estab-

lish noncompliance with the applicable Ohio statute. *Ohio v. Four Seasons Nursing Centers of America,* 10 Cir., 465 F.2d 25.

Ohio filed three appeals from orders in the Chapter X proceedings. It was particularly opposed to those portions of successive plans of reorganization which resulted in one-third of the stock in the reorganized corporation (Anta) going to "Class G Creditor Stockholders." Ohio was designated a "Class C Creditor" (general unsecured creditor) and was permitted under the amended plan to receive one share of Anta stock for each $7 principal amount of allowed claims.

On May 21, 1971 ten actions—seven of which claimed to have been brought on behalf of all purchasers of stock of the Four Seasons companies who suffered a loss—were brought in or transferred to the Western District of Oklahoma and were assigned to Judge Thomsen by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407. *In re Four Seasons Securities Law Litigation,* Jud. Pan. Mult. Lit., 328 F. Supp. 221. Numerous other cases were subsequently transferred. All together 40 individuals, partnerships, and corporations were named as defendants in one or more of the actions, which sought to be treated as class actions. In one or more of the complaints, claims were asserted against some or all of the defendants under §§ 5, 11, 12, and 17(a) of the Securities Act of 1933, under §§ 9, 10(b), and 20 of the Securities and Exchange Act of 1934, and under Rule 10b-5 of the SEC. The litigation proceeded as M.D.L. 55.

Meanwhile, in March 1972 the state of Ohio, through the office of the Attorney General, filed three suits:

(1) State of Ohio v. Crofters, Inc., et al., Civil Action No. 72-81, in the United States District Court for the Southern District of Ohio, Western Division. Among the several groups of defendants in that case were Clark, Gray, Mee, Andrews and McCollum, defendants in some of the M.D.L. 55 cases. The complaint includes eleven claims:

First Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

Second Claim—§ 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; § 29 (b) of the Exchange Act, 15 U.S.C. § 78cc(b).

Third Claim—§ 17(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1).

Fourth Claim—§ 17(b) of the Securities Act, 15 U.S.C. § 77q(b).

Fifth Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a); § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5.

Sixth Claim—§ 15(c)(1) of the Exchange Act, 15 U.S.C. § 78o(c)(1), Rule 15c1-2, 17 C.F.R. § 240.17c1-2; § 15(c)(2) of the Exchange Act, 15 U.S.C. § 78o (c)(2).

Seventh Claim—§ 1707.44(B)(4), § 1707.43, Ohio Revised Code.

Eighth Claim—§ 1707.44(G), § 1707.43, Ohio Revised Code.

Ninth Claim—§ 1707.14, § 1707.44(A), and § 1707.43, Ohio Revised Code.

Tenth Claim—§ 1707.41, Ohio Revised Code.

Eleventh Claim—Common Law Fraud.

Some of these statutory bases are the same as those in one or more of the M.D.L. 55 class actions; some are not.

Clark filed a counterclaim against Ohio in this case, third-party claims against Walston & Co. and Arthur Andersen & Co., and various cross-claims.

(2) State of Ohio v. Herbert, et al., in the Court of Common Pleas of Franklin County, Ohio.

This is an action against the Treasurer of the State, another official, and the sureties on their bonds, alleging violation of certain Ohio statutes and of the officials' duties. All of the defendants in State of Ohio v. Crofters, Inc., et al., have been brought into that case as third-party defendants.

(3) Shaul, Director of Commerce of the State of Ohio v. Crofters, Inc., et al., in the Court of Common Pleas of Franklin County, Ohio. Clark, Gray, Mee, Andrews, and McCollum are also defendants in that case, which is based on alleged violations of the Ohio Code, and seeks injunctive relief.

Negotiations took place in the spring and summer of 1972 which were aimed at the settlement of various claims, including those in the M.D.L. 55 actions, the actions of the Trustee of the debtor estates against many of the M.D.L. 55 defendants and the appeals of Ohio in the Chapter X proceedings. Various attorneys for the state of Ohio were aware of these negotiations and participated in one or more of the discussions, but no one moved to have State of Ohio

v. Crofters, Inc., in the Southern District of Ohio, transferred to M.D.L. 55 in the Western District of Oklahoma.[2]

In July 1972 Judge Thomsen states he was willing to enter an order in M.D.L. 55 which would, in effect, designate five actions as class actions and divide the plaintiffs preliminarily, and subject to the right to modify, into two classes for pretrial and discovery purposes. Ohio was a member of one of these classes. At this time all counsel present, which did not include counsel for Ohio, asked the court to hold up entry of the proposed order to permit them to continue settlement negotiations. The order was held up and negotiations continued until a settlement was reached and presented to the court on September 21, 1972.

It became apparent during these negotiations that settlement of Ohio's claims in the Chapter X proceedings was a prerequisite to the settlement of the Trustee claims in M.D.L. 55 because the plan for reorganization could not be carried out until Ohio's claims were settled. Toward this end attorneys for Ohio and the Trustee continued negotiations until a settlement was agreed upon on September 13, 1972. During the course of these discussions, the Ohio attorneys met with counsel for some of the M.D.L. defendants, although they did not meet with attorneys for the plaintiffs in that litigation. The Ohio attorneys were never told that Ohio was a member of one of the classes which the court had indicated would be preliminarily designated in M.D.L. 55 if settlement negotiations there fell through. Ohio's attorneys did not inquire about the M.D.L. 55 classes and no one volunteered the information to them.

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2. A motion to transfer that case was subsequently made to the Judicial Panel on Multidistrict Litigation, and the case was thereafter transferred by the panel to M.D.L. 55. *In re Four Seasons Securities Laws Litigation*, 361 F. Supp. 636.

Gretick, the attorney in charge of the case for Ohio, went to Oklahoma City on September 19 to work with Bailey, the Trustee's attorney, on the terms of the joint application for settlement in the Chapter X proceedings. Bailey left for Baltimore on September 20 and was present when the M.D.L. 55 settlement was reached and the order signed by the court on September 21. That order defined the Rule 23(b)(3) classes as follows:

> (a) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;
>
> (b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper.

Bailey returned to Oklahoma City on September 22 and completed work with Gretick on the joint application for settlement in the Chapter X proceedings that evening. He told Gretick that M.D.L. 55 "had been settled around Ohio." By the terms of the settlement Ohio received,

in addition to the Anta stock it received as a Class C Creditor, proceeds from the sale of valuable real estate. Ohio, in return, agreed to dismiss its pending appeals.

In addition to the designation of classes which, it is conceded here, included the state of Ohio,[3] the M.D.L. 55 order of September 21 included several other clauses pertinent to our consideration on appeal. Clause 19 preserved the rights of the M.D.L. 55 defendants to assert their claims and causes of action, including cross-claims and claims for contribution and indemnity, which related to or arose out of or in connection with the Ohio $4,000,000 loan and the litigation relating thereto. In addition, the order provided that claims of Class C Creditors in the Chapter X proceeding should be reduced to ten percent of the face amount of the securities on which their claim was based. This provision was in recognition of the fact that Class C Creditors had already received compensation through the Chapter X proceedings.

Finally, the order made it clear that the settlement was intended to include all claims which had been or could be asserted by or on behalf of the classes, or any member thereof, arising out of or relating to any act or omission concerning the Four Seasons companies, and other related or affiliated companies, or relating to the business, management or financial statements of any of the Four Seasons companies, or transactions in the securities or commercial paper of any of the Four Seasons companies, prior to the date of entry of the final judgment provided for in the order, whether or not asserted in the class actions. It barred forever the prosecution against the de-

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3. Ohio was a class member as holder of securities, as defined in the Federal Securities Laws, or commercial paper, or both.

fendants of any and all settled claims by any member of the classes, except by those who opted out.

Notice of the proposed settlement was published in the Wall Street Journal and two copies of the order, notice, and accompanying papers were mailed, one to Ohio, c/o the Attorney General, and one to William Brown, Attorney General. The return receipts indicated that the mailings were delivered to the office of the Attorney General, one on October 6 and the other on October 10, 1972. One set was subsequently discovered in Gretick's file. The other has not been located.

On October 12 Gretick was in Oklahoma City for hearings on the settlement of Ohio's claims in the Chapter X proceedings. He had not read the September 21 order or the notice. Bailey showed him a copy of the order. Gretick "riffled" through it and asked Bailey to mail him a copy. This was not done. Gretick left the Attorney General's office two weeks later and Ronald B. Brown was made lead counsel in the Four Seasons case. Late in October he saw the M.D.L. order of September 21, read the first page and thumbed through some additional papers, assuming that Gretick had done what was necessary. No election to opt out was filed by Ohio. Hearings on the M.D.L. 55 settlement were held on November 16 and 17, 1972. The judgment approving the settlement was signed November 30 and entered on December 4, 1972.

On December 5 counsel for Clark referred to the settlement during a pretrial hearing in State of Ohio v. Crofters, Inc., et al., and Brown then read the September 21 order in M.D.L. 55 for the first time. Ohio took no appeal from the judgment but on January 2, 1973 filed its motion for relief from judgment under Rule 60(b)(1),

(4), and (6).[4] The motion was granted and this appeal by affected M.D.L. 55 defendants followed.[5]

In granting Ohio's motion for relief, the court below examined each of the allegations presented under Rule 60(b)(1), (4), and (6). Ohio first claimed that its failure to opt out was the result of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1). The court was not persuaded by this claim. "If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent." 59 F.R.D. at 678. The court concluded, however, that Ohio negotiated with the Chapter X Trustee in the belief that it would not be included in the M.D.L. 55 classes and the attorneys for the Chapter X Trustee did nothing to dispel this belief. These circumstances, plus the statement of the attorney for the Chapter X Trustee "that the case had been settled around Ohio," explained but did not excuse Ohio's neglect. 59 F.R.D. at 679.

Ohio's Rule 60(b)(4) claim was that the judgment as to it was void. In this context the court considered the Rule 23(a)(3) requirement that the claims or defenses

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4. Rule 60. Relief From Judgment Or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (4) the judgment is void; * * * or (6) any other reason justifying relief from the operation of the judgment.

5. The court below entered an order, based upon Ohio's assurance that it would not file an appeal from the December 4 judgment, authorizing Ohio to file a contingent proof of claim under the M.D.L. 55 settlement. The proof of claim was to become null and void if Ohio's Rule 60(b) motion was finally granted, but would become fully effective and unqualified if the motion was denied.

of the representative parties must be typical of the claims or defenses of the class, the Rule 23(a)(4) requirement that the representative parties will fairly and adequately protect the interests of the class, and the Rule 23(c)(2) requirement that in any class action maintained under (b)(3) the members of the class must be given the best notice practicable under the circumstances. When these requirements are met, the court reasoned, due process is satisfied.

The court first found that the required notice was given (in fact two copies of the notice were actually received by Ohio) and then proceeded to examine the adequacy of representation and typicality questions. On the typicality issue, Ohio sought to distinguish its position from that of other M.D.L. 55 class members on grounds that (1) Ohio's loans were evidenced by promissory notes maturing in two years and that Ohio, unlike the other securities purchasers, was bargaining for interest return alone and not for any present or prospective equity in Four Seasons; (2) that its loans were privately negotiated through a finder-broker and required no registration statement, prospectus, other reporting, or professional underwriting group; and (3) that the promissory notes were represented to be commercial paper.

The court concluded that Ohio was included within one of the classes created in M.D.L. 55 because the promissory notes it acquired were securities within the meaning of the Federal Securities Act of 1933 and the Securities and Exchange Act of 1934. Reasoning that typicality does not require that claims of class representatives be "co-extensive with" or "identical to" those of other class members, the court pointed out that each member of the class purchased his security or securities in transactions separate from other class members and that the fact patterns for each necessarily varied. All relied on alleged misrepresentations em-

braced in the general conspiracy theory advanced by class representatives and covered by the alleged violations of the securities laws. After considering all of the evidence, the court found that "the claims of the class members were typical of the claims Ohio asserted in *State of Ohio v. Crofters, Inc., et al.*, and the third-party complaints against Clark and others in *State of Ohio v. Herbert et al.*, but were not typical of the claims asserted by Ohio in its complaint against Herbert, Gardner, and their sureties." 59 F.R.D. at 682.

Ohio's contention that it had not been represented adequately was premised on the same distinctions between its claims and those of the class representatives which were alleged in its typicality argument. The court found that these distinctions alone, again with the exception of the claims against Herbert, Gardner, and their sureties, did not demonstrate a lack of adequate representation. But when viewed in light of the ultimate terms of the settlement, which provided for the claims of Class C Creditors in the Chapter X proceedings to be reduced to ten percent of the face amount of the securities on which their claim was based and further reserved the rights of the M.D.L. 55 defendants against Ohio, the representation question became more troublesome. The court pointed out that none of the Class C Creditors was a class representative and that there was therefore some force to Ohio's contention that a Class C Creditor could not be adequately represented in the settlement. In addition, the court found that the provisions preserving the claims of the M.D.L. defendants against Ohio "were included with the expectation on the part of everyone that Ohio would opt out." 59 F.R.D. at 683. Finally, when these provisions and the differences between Ohio's claims and the claims of other class members were considered together, "Ohio has made a strong case that the

judgment should be held void as to all the claims of Ohio." Id.

Added to these factors, under Rule 60(b)(6), was the "lulling effect" which the court felt the dealings between the attorneys for Ohio and the attorney for the Chapter X Trustee had on Ohio's failure to opt out. The end result was that "the totality of the evidence required that Ohio be relieved from the operation of the judgment." Id.

This account of the lower court's decisional process is presented in some detail in order to demonstrate that the court did not pigeonhole its basis for relief into any particular one of the Rule 60(b) categories. Reliance to some extent was placed on 60(b)(1), (4), and (6) and our appellate review cannot be conveniently telescoped. We must therefore consider whether, under all of the circumstances, the relief granted was justified.

We must at the outset dismiss appellants' contention that the provisions of Rule 60(b)(1)-(5) and 60(b)(6) are mutually exclusive and that the court below misapplied the rule in apparently aggregating claims under 60(b)(1), (4), and (6). It is true that the weight of authority indicates that a Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1) - (5). *Klapprott v. United States*, 335 U.S. 601; *United States v. Karahalias*, 2 Cir., 205 F.2d 331 (on rehearing); and 7 Moore's Federal Practice ¶ 60.27(1). But it is also clear that this rule stems of necessity from the one-year time limitation which attaches to motions for relief under 60(b)(1) - (3). Rule 60(b)(6) requires only that the motion be made within a "reasonable time" and it would obviously frustrate the one-year limitation if a 60(b)(6) motion could be brought after this period for reasons articulated in 60(b)(1) - (3). The cases support this interpretation of

the exclusivity rule, and motions timely brought under Rule 60(b) have encountered little technical difficulty as to whether the motion in fact comes under clause (6) or one of the earlier clauses. *Laguna Royalty Co. v. Marsh*, 5 Cir., 350 F.2d 817; *Rooks v. American Brass Co.*, 6 Cir., 263 F.2d 166; 11 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2864, at 212. Where, as in the case at bar, the motion is timely filed under any of the 60(b) clauses, the court should not be bound by a strict categorization of particular claims. We thus do not consider it necessary to attempt to pinpoint which, if any in particular, of the 60(b) clauses formed the basis for the decision of the court below.

When viewed in its entirety, it is apparent that the real basis for the court's decision below, notwithstanding the analysis directed to particular clauses under Rule 60, was its belief that under all of the circumstances presented Ohio was simply denied due process of law. The court in essence concluded that the aforementioned clauses in the settlement agreement reflected an inadequacy of representation which, at least with respect to the claims against Herbert, Gardner, and their sureties, was predetermined through the lack of typicality of those claims under Rule 23(a)(3). It is interesting to note in this latter respect that at least one court has stated that the typicality requirement was "designed to buttress the fair representation requirement in Rule 23(a)(4)." *Rosado v. Wyman*, E.D. N.Y., 322 F. Supp. 1173, 1193, *affirmed on other grounds*, 2 Cir., 437 F.2d 619, *affirmed*, 402 U.S. 991. This view, of course, comports with common sense in that atypical claims presumably could not be adequately represented by a class representative unfamiliar or unconcerned with their peculiar characteristics.

We are supported in our view that the lower court's decision was based upon due process considerations[6] by the fact that the major claims of Ohio were asserted and addressed under the Rule 60(b)(4) voidness of the judgment clause, and a judgment is not void merely because it is erroneous, but only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law.[7] 11 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862, at 199, 200. Jurisdiction not being challenged, the judgment could be attacked as void only on due process grounds and, indeed, the court couched its 60(b)(4) consideration in terms of due process. 59 F.R.D. at 679.

The touchstones of due process in class actions have always been notice and adequacy of representation, but their interrelationship has never been completely and clearly articulated. Assuming the conclusion of the court below on the adequacy question to be correct, we must at the outset determine what if any impact the notice provided to Ohio had on its standing to argue a denial of due process under Rule 60(b).

The landmark due process decision in class action law is *Hansberry v. Lee*, 311 U.S. 32. In that case the Supreme Court refused to give res judicata effect to a state court decision against certain ostensible class members who had not received notice and had not been adequately represented. The Court's due process analysis was centered around the question of adequacy of representation

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6. The "lulling effect" must be seen as only one more factor in the due process determination, especially in view of the fact that Ohio's neglect was deemed, properly we think, inexcusable under Rule 60(b)(1).

7. *Bass v. Hoagland*, 5 Cir., 172 F.2d 205, *cert. denied* 338 U.S. 816.

and the decision has subsequently been interpreted to establish adequate representation as a prerequisite for due process in class actions.[8] *See, inter alia, Gonzales v. Cassidy,* 5 Cir., 474 F.2d 67; *Northern Natural Gas Co. v. Grounds,* D.Kan., 292 F. Supp. 619; *Dolgow v. Anderson,* E.D.N.Y., 43 F.R.D. 472. It is important to note, however, that these cases are distinguishable from that presented here in that they involved either actions brought under sections other than 23(b)(3), with its built-in opportunity to opt out, or determinations as to whether a class action should be maintained in the first instance.[9] The present case involves a unique factual situation and requires a closer consideration of due process requirements.

In 1966 class action procedures were revised under Rule 23(c)(2) with respect to actions, such as the instant one, brought under Rule 23(b)(3). Recognizing the unique availability of exclusion under 23(b)(3) actions, the revised rule requires that the best practicable notice under the circumstances be sent to the members of the class advising them of their right to opt out or to enter an appearance in the action through counsel. The resulting judgment, whether favorable or not, will bind all members who then

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8. It is not entirely unfair to characterize this interpretation as overly broad. The Court did not say that both notice and adequate representation were necessary to satisfy due process. It is entirely feasible that the Court reached the adequacy issue because no notice had been given and was willing to enforce the prior state decision if adequacy were present despite lack of notice. The question of whether notice itself would have been sufficient, it seems to us, was left unanswered. *See also, e.g., Schrader v. Selective Service System Local Board No. 76 of Wisconsin,* W.D. Wis., 329 F. Supp. 966, in which adequacy overcame the lack of notice.

9. In the *Gonzales* case, heavily relied on by Ohio, the court took pains to point out that the action was maintained under 23(b)(2) and not 23(b)(3) with its special notice requirements and opt-out provisions. "As a result of these distinctions class members in (b)(1) and (b)(2) actions must necessarily rely on the representative to protect their interest." 474 F.2d at 74 n. 12.

fail to exercise the option to be excluded. By requiring this affirmative action by the absentee, the rule seeks to eliminate "one-way intervention," a practice common in "spurious"[10] class suits prior to 1966. *Shane v. Northwest Indus., Inc.*, D.C. Ill., 49 F.R.D. 46; *State of Minnesota v. U.S. Steel Corp.*, D.C. Minn., 44 F.R.D. 559.

While adequacy of representation has been upheld as an extremely important factor in due process considerations in class actions and has, in fact, been deemed a prerequisite thereto under most circumstances, we do not feel bound in the instant proceeding by *Hansberry* and its progeny. For we consider here an action in which Ohio not only received notice of its inclusion within the designated class, with the concomitant right to opt out, but one in which Ohio was also apprised of the very terms of the impending judgment. It was thus presented with the unique opportunity of judging, retrospectively, whether its interests *had been* adequately represented at a time when it was capable of excluding itself if not satisfied. We do not feel that due process requirements under the facts presented here have yet been articulated.[11]

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10. A "spurious" suit was one in which the action was based solely on common questions. The judgment bound only the named parties and those who joined. 7A WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURES § 1777, at 45. "One-way intervention" occurred when courts permitted absent parties to intervene after a decision favorable to their interests, even though an unfavorable decision would not have bound them.

11. In the recent case of *Eisen v. Carlisle & Jacquelin*, No. 73-203, dec. May 28, 1974, the Supreme Court extended the Rule 23(c)(2) best-practicable notice requirement to all 23(b)(3) class members who can be identified through reasonable effort. In response to the contention that adequacy of representation, rather than notice, was sufficient for due process, the Court responded: "We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." The decision, however, preceded any judgment and concerned the question of whether the action could be maintained, and is thus, like the previous cases cited, factually distinguishable from this controversy. Moreover, the Court speaks to the requirements of the *rule*, and not the Constitution.

We are constrained to conclude that due process was satisfied here when Ohio received the notice and order delineating the terms of the proposed settlement and informing Ohio that it was a designated member of a class, that it had the opportunity to opt out or be represented by counsel, that it would be bound if it failed to opt out. In such a case, we conclude that due process may be satisfied by notice alone and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity.

In reaching this conclusion we are guided by the purpose of the rule to prevent one-way intervention, the interests in the finality of judgments, and related case law precedent. To uphold the decision of the court below would, in our opinion, offer "a return to one-way intervention under a new guise." *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459. *See* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARVARD LAW REVIEW 589, 601. Defendants would be placed in the difficult position of having to go through complex litigation a second time against parties that would have participated in the judgment had it been favorable to them and, as appellants contend happened in the present case, the same arguments may be used against them which they had previously urged when they originally challenged the maintenance of the class action. The purpose of class actions is to avoid multiplicity of suits and upholding the decision of the court below would frustrate not only the interest in finality of judgments but also the interest in settlement of complex litigation.

Finally, we note that this is not the first time that a class member with notice has been bound by a judgment after failing to take some affirmative action. *See Brennan v. Midwestern United Life Ins. Co.*, 7 Cir., 450 F.2d 999;

Mungin v. Florida East Coast Ry. Co., M.D. Fla., 318 F. Supp. 720; *School District of Philadelphia v. Harper & Row Publishers, Inc.*, E.D. Pa., 267 F. Supp. 1001; *Supermarkets General Corp. v. Grinnell Corp.*, S.D. N.Y., 59 F.R.D. 512, *affirmed*, 2 Cir., 490 F.2d 1183. In *Research Corp. v. Asgrow Seed Co.*, 7 Cir., 425 F.2d 1059, appellants, who had not been named class defendants but who had received notice, sought to appeal from a class settlement judgment. Appellants did not intervene or object to the settlement and the appeal was dismissed for reasons which we find particularly pertinent here:[12]

> However, in order to encourage or even to permit settlement, a person in disagreement with the terms of a settlement must take, at least, these minimal steps to preserve his right to appeal. Accordingly, since appellants had both actual and constructive knowledge of the settlement and since they took no steps to object to the settlement prior to the entry of judgment, the appeal must be dismissed. 425 F.2d at 1060-61.

We find for similar reasons that the Rule 60(b) relief sought in the court below should have been denied. Under the particular facts here presented there has been no denial of due process.

The case is reversed and remanded with instructions to reinstate the judgment.

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12. In *Ace Heating & Plumbing Co. v. Crane Co.*, 3 Cir., 453 F.2d 30, the court considered the same issue as that presented in *Research Corp.* but concluded that it was not dispositive on the facts presented because appellants were members of a class so small that they had no litigable claims unless aggregated and that for those so situated the option to join in or opt out is in reality no option at all. They must accept either nothing at all or a possibly unfair settlement, the court held, and thus had standing to appeal. No such mitigating circumstances are present here.

JUDGMENT OF THE TENTH CIRCUIT

(August 13, 1974)

Nos. 73-1781, 73-1782, 73-1783, 73-1784

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

Appeals of:
ARTHUR ANDERSEN & CO.; JACK L. CLARK; GORDON H. McCOLLUM; WALSTON & CO., INC.; MONTGOMERY CO.; and GLENN R. MILLER,
Appellants,

vs.

STATE OF OHIO,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(M.D.L. 55)

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of the United States District Court for the Western District of Oklahoma is reversed. The cause is remanded with instructions to reinstate the judgment.

/s/ Howard K. Phillips
Clerk

OPINION OF THE DISTRICT COURT DESIGNATED "OPINION NO. 4"

(Dated June 7, 1973)

M.D.L. Docket No. 55

UNITED STATES DISTRICT COURT
For the Western District of Oklahoma

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

MOTION OF OHIO FOR RELIEF FROM JUDGMENT

THOMSEN, *District Judge.**

The State of Ohio seeks relief under Rule 60(b), F.R.Civ.P., grounds (1), (4) and (6),[1] from the provision of the judgment herein signed on November 30, 1972, and entered on December 4, 1972, which barred forever the prosecution against the defendants in the class actions or anyone else of any and all settled claims by any member of either or both of the M.D.L. 55 classes, established by the order of September 21, 1972, herein, except by those who filed timely requests to be excluded from the classes. That judgment was entered after a hearing on approval

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*Of the District of Maryland, sitting by designation.

1. "Rule 60. *Relief From Judgment Or Order*

"* * *

"(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (4) the judgment is void; * * * or (6) any other reason justifying relief from the operation of the judgment. * * *"

of the settlement of the M.D.L. 55 class actions. See Opinion No. 2 herein, 58 F.R.D. 19, at 32-35 (1972).

Ohio had filed three actions in March 1972 against various persons, firms and corporations (including several persons who were defendants in the M.D.L. class actions) based upon alleged violations of its common law rights, various Ohio statutes, the Federal Securities Act of 1933 and the Federal Securities Exchange Act of 1934, arising out of loans in the total amount of $4,000,000 made by Ohio to Four Seasons Nursing Centers of America, evidenced by promissory notes of that corporation. Ohio was a member of the classes established by the order of this court dated September 21, 1972, because it was the holder of securities, as defined in the Federal Securities Laws, or of commercial paper, or both. See Opinion No. 2, 58 F.R.D. at 32. Although Ohio received notice of the settlement of the M.D.L. 55 class actions, it did not opt out.

Ohio's interrelated arguments as to why it should be relieved from the judgment are based upon claimed mistake of fact, inadvertence, surprise and/or excusable neglect, the alleged merit of its claims, the equities, the asserted lack of prejudice to defendants, and Ohio's contention that it was not adequately represented by any of the class plaintiffs.

Facts

The court adopts as part of this opinion the contents of Opinion No. 2 herein, 58 F.R.D. 19, which contains a history of the Four Seasons companies, of the Chapter X proceedings involving those companies, and of the M.D.L. 55 suits, including a summary of the settlement, the hearing on confirmation of the settlement, and the subsequent proceedings, as well as a full discussion of the reasons for approval and confirmation of the settlement.

The Ohio Loans

The facts with respect to the loans are set out in State of Ohio v. Four Seasons Nursing Centers of America, 465 F.2d 25, at 26, 27 (10 Cir. 1972), as follows:

> "In early 1970, Mr. Jack L. Clark, the president of Four Seasons, received information that a Mr. Ronald R. Howard of Los Angeles, California, was in a position to assist Four Seasons in borrowing needed funds for continued operation and expansion. Howard and Clark conferred in Oklahoma City for the purpose of consummating an agreement for the procurement of funds. It was anticipated that Four Seasons would borrow between $20,000,000 and $24,000,000 from the State of Ohio. Howard contacted Crofters, Inc., a Columbus, Ohio, investment firm. Mr. Harry A. Groban, the executive vice president of Crofters, requested a credit rating on Four Seasons from the National Credit Office, a division of Dun and Bradstreet. An employee of the National Credit Office procured the latest annual report of Four Seasons, as well as other statements and bank information concerning that corporation from Mr. John Mee, a vice president of and attorney for Four Seasons. Based on this material, the National Credit Office gave Four Seasons a rating of 'prime' for commercial paper. This information was communicated by letter to Groban; Groban in turn furnished the information to Mr. Robert F. Gardner, Deputy Treasurer of the State of Ohio.
>
> "Groban advised Mee that funds would be available to Four Seasons from the State of Ohio. Thereafter, Mr. Alex Russell, an officer of Four Seasons, went to Columbus, Ohio, to secure the funds. On March 9, 1970, Russell consummated a loan of

$3,000,000 for Four Seasons with the State of Ohio through Gardner and in the presence of Groban. The loan was evidenced by two promissory notes of Four Seasons, one for $2,000,000 payable in 120 days and another for $1,000,000 due in two years. The $2,000,000 note was made on the basis of 120 days with the understanding that when due the note would be renewed for a period of two years. A second loan for $1,000,000 was advanced on March 23, 1970; a note for $1,000,000 payable in two years to the State of Ohio was executed on that date."

Chapter X Proceedings

Ohio sought reclamation of these funds as against the Trustee in the Chapter X reorganization proceedings of the Four Seasons companies. Ohio argued, inter alia, that Four Seasons had intentionally made material and fraudulent misrepresentations concerning its financial condition to National Credit Office (NCO) to obtain a rating of prime, and that the loans of $4,000,000 had been made by Ohio in reliance on that rating. Ohio also argued that the loans were in violation of an Ohio statute and therefore void.

Judge Bohanon denied the reclamation petition. He said, inter alia:

"There is no intimation in this record that Four Seasons defrauded the State of Ohio or made any misrepresentations to the State of Ohio, but at all times dealt above board and submitted all information requested and withheld nothing. Mr. Gardner made no reliance upon any alleged fraudulent document or statement made by the debtor corporation, its officers or agents, and no fraud here exists, and no misrepre-

sentations were made to the State of Ohio, or others." *In re Four Seasons Nursing Centers of America, Inc.*, 329 F.Supp. 647, 651-652 (W.D.Okla., 1971).

On appeal, in addition to points based on Ohio law, which Judge Bohanon and the Tenth Circuit found inapplicable, Ohio argued "that the prime rating relied on by the Ohio Treasurer was obtained through Four Seasons' materially false statements" and that Ohio was "alternatively entitled to the return of all funds traceable under traditional tracing rules". The Tenth Circuit stated: "We view the narrow issue presented in this appeal to be whether the State of Ohio may properly argue the application of a constructive trust to the funds in question." 465 F.2d at 27.

After deciding that Oklahoma law controlled that issue, the Court said:

> "We likewise reject appellant's argument that the prime rating relied upon by the Ohio State Treasurer in making these loans was obtained through Four Seasons' materially false statements concerning its financial status. The trial court found no fraud or misrepresentation after an evaluation of the testimony presented before it in a full hearing. We hold this decision to be adequately supported by the record; there is no cogent reason to reverse the trial court on this point. Accordingly, we affirm the finding of no fraud or misrepresentation in obtaining the rating of prime from the National Credit Office.
>
> "We are unconvinced by appellant's remaining arguments that a constructive trust is applicable to the funds in question. The quantum of evidence required by Oklahoma for imposition of a constructive trust is substantial. Mere preponderance of the evi-

dence is not sufficient to establish a constructive trust. Rather, it must be established by evidence which is clear, definite, unequivocal and satisfactory. The evidence must lead to but one conclusion, or leave no reasonable doubt as to the existence of the constructive trust. The evidence presented by appellant in the trial court does not rise to the quantum required by Oklahoma." 465 F.2d at 28.

The Tenth Circuit likewise found that there was no illegality surrounding the procurement of the funds, because the evidence did not prove noncompliance with the applicable Ohio statute; it affirmed the denial of relief. 465 F.2d at 28, 29.

Ohio also opposed those portions of the successive plans of reorganization of the Four Seasons companies which resulted in one-third of the stock of the reorganized corporation (Anta) going to "Class G Creditor Stockholders".[2] Ohio and the other general creditors of Four Seasons were "Class C Creditors."[3] At the hearing on November 2, 1971, on the plan of reorganization as then proposed, Judge Bohanon said:

"The Court now has before it the problem first of whether or not Equity and Four Seasons were in effect one and the same. They worked together, as a

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2. See discussion in Opinion No. 2 herein, 58 F.R.D. at 26, et seq.

3. At one time during the reorganization period, the definition of the proposed classes was such that Ohio might have been included in both Class C and Class G, but the plan as finally adopted allowed Ohio to recover only in Class C. While in Oklahoma City for the November 1971 hearing in the Chapter X proceedings, the attorneys for Ohio discussed the possibility of Ohio being in Class G with the attorneys for M.D.L. 55 plaintiffs who were pressing in the Chapter X proceedings the claims of persons who became Class G creditor stockholders in the reorganization plan which was finally approved.

joint adventure, helping one another, and helping Jack Clark and his robbers, and that is what they were—nothing short of just rob the American people."

His final oral opinion did not include this remark.

Ohio filed three appeals from orders in the Chapter X proceedings, including the order of July 17, 1972, which approved the Second Amended Plan of Reorganization (Restated). On September 22, 1972, however, Ohio entered into a settlement agreement with the Trustee in the Chapter X proceedings under which Ohio received proceeds from the sale of valuable real estate in addition to the Anta stock Ohio received as a Class C creditor in the Chapter X proceedings, and Ohio agreed to dismiss its pending appeals. A joint application to compromise controversy was filed on September 26, 1972, and approved October 12, 1972.

Another appeal from the order of July 17, 1972, by Charles O. Finley, et al., dealing with a limited aspect of the proceedings, was heard by the Tenth Circuit, which affirmed the district court, 472 F.2d 747 (1973). With respect to Class G stockholders, the Tenth Circuit said:

"The trial court's decision at bar, the effect of which was to give to the Class G group the standing of claimant-creditors, was made only after a very careful consideration of the underlying evidence. The court determined that there was merit in their contentions that they had been defrauded in the purchase of their shares so that there was a reasonable likelihood that they would have succeeded in litigation. All of this was a basis for the court's approval of the compromise settlement which resulted in their being issued shares in the reorganized company. It cannot, of course, be said that the Class G individuals did not satisfy the

definition of 'creditor' and of 'claim' under §§ 106(1) and 106(4). The definition of a 'claim' under the former provision includes all claims whether secured or unsecured, liquidated or unliquidated, fixed or contingent." 472 F.2d at 749.

The Suits Filed in Ohio

Meanwhile, in March 1972 the State of Ohio, through the office of the Attorney General filed three suits:

(1) State of Ohio v. Crofters, Inc., et al., Civil Action No. 72-81, in the United States District Court for the Southern District of Ohio, Western Division. Among the several groups of defendants in that case were Clark, Gray, Mee, Andrews and McCollum, defendants in some of the M.D.L. 55 cases. The complaint includes eleven claims:

First Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

Second Claim—§ 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; § 29(b) of the Exchange Act, 15 U.S.C. § 78cc(b).

Third Claim—§ 15(a)(1) of the Exchange Act, 15 U.S.C. §78*o*(a)(1).

Fourth Claim—§ 17(b) of the Securities Act, 15 U.S.C. § 77q(b).

Fifth Claim—§ 17(a) of the Securities Act, 15 U.S.C. § 77q(a); § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5.

Sixth Claim—§ 15(c)(1) of the Exchange Act, 15 U.S.C. § 78*o*(c)(1), Rule 15c1-2, 17 C.F.R. § 240.15 c1-2; § 15(c)(2) of the Exchange Act, 15 U.S.C. § 78*o*(c)(2).

Seventh Claim—§ 1707.44(B)(4), § 1707.43, Ohio Revised Code.

Eighth Claim—§ 1707.44(G), § 1707.43, Ohio Revised Code.

Ninth Claim—§ 1707.14, § 1707.44(A), and § 1707.43, Ohio Revised Code.

Tenth Claim—§ 1707.41, Ohio Revised Code.

Eleventh Claim—Common Law Fraud.

Some of these statutory bases are the same as those in one or more of the M.D.L. 55 class actions; some are not.

Clark filed a counterclaim against Ohio in this case, third-party claims against Walston & Co. and Arthur Andersen & Co., and various cross claims.

(2) State of Ohio v. Herbert, et al., in the Court of Common Pleas of Franklin County, Ohio.

This is an action against the Treasurer of the State, another official, and the sureties on their bonds, alleging violation of certain Ohio statutes and of the officials' duties. All of the defendants in State of Ohio v. Crofters, Inc., et al., have been brought into that case as third-party defendants.

(3) Shaul, Director of Commerce of the State of Ohio v. Crofters, Inc., et al., in the Court of Common Pleas of Franklin County, Ohio. Clark, Gray, Mee, Andrews and McCollum are also defendants in that case, which is based on alleged violations of the Ohio Code, and seeks injunctive relief.

The S.E.C. filed an action in the Southern District of Ohio to obtain an injunction against Crofters, Inc., and various individuals and organizations, including Clark,

based upon various sales of securities in the form of corporate promissory notes, alleging violations of the Federal Securities Laws. See opinion of Judge Rubin in S.E.C. v. Crofters, Inc., 351 F. Supp. 236 (1972), granting injunctive relief.

Settlement

During the spring and summer of 1972, negotiations were in progress looking toward settlement of various claims, including those in the M.D.L. 55 actions, the action of the Trustee of the debtor estates against many of the M.D.L. 55 defendants[4] and the appeals of Ohio in the Chapter X proceedings.

Various attorneys for the State of Ohio, including the Attorney General, participated in one or more of these discussions, which were held in Oklahoma City, New York and Ohio. Those attorneys knew about the M.D.L. 55 cases, but no one had yet made an effort to have the case of State of Ohio v. Crofters, Inc., et al., in the Southern District of Ohio, transferred under 28 U.S.C. § 1407. A motion to transfer that case is now pending before the Judicial Panel on Multidistrict Litigation.

The problems involved in determining what class or classes should be established in M.D.L. 55 were the subject of repeated hearings in this proceeding. In July 1972, after prolonged hearings of the class problem, the court stated that it was willing to enter an order, hammered out by court and counsel during the conference, which would, in effect, designate five actions as class actions and conditionally, preliminarily and tentatively divide the persons for whose benefit the cases purport to be brought, solely for pretrial and discovery purposes, into two classes, subject

4. Which replaced the derivative claims theretofore made in some of the M.D.L. 55 cases.

to the right of the court to modify or withdraw such designation and division at any time prior to decision on the merits. Relevant portions of the proposed order are set out in Opinion No. 2 herein, 58 F.R.D. at 31, including notes 28 and 29. As this court noted in that opinion: "All counsel present then advised the court that they were engaged in very serious settlement negotiations, and asked the court to hold up the entry of the proposed order for a brief period, to permit them to continue their negotiations. They convinced the court that, in view of all the circumstances of this case, it would be fairer to the thousands of members of the potential classes, as well as the parties presently represented by counsel in the cases before the court, to let them know the terms of a proposed settlement before requiring them to decide whether or not to opt out." 58 F.R.D. at 31. See also note 30 on that page. The negotiations looking toward a settlement of the M.D.L. 55 claims and the claims of the Trustee against many of the same defendants continued until a settlement was reached and presented to this court on September 21, 1972.

During the last two months of those negotiations it became apparent that a settlement of the Ohio claims in the Chapter X proceedings was a prerequisite to a settlement of the M.D.L. 55 and Trustee claims, because, until the Ohio claims in the Chapter X proceedings were settled, the Second Amended Plan of Reorganization (Restated) could not be carried out. Negotiations continued between the attorneys for Ohio and the attorneys for the Trustee, at least one of which was held in New York at the same time as a meeting of the attorneys for both sides in the M.D.L. 55 cases. While in New York the attorneys for Ohio met with some of the attorneys for the defendants in M.D.L. 55, but did not meet with the attorneys for the plaintiffs therein. The attorneys for the M.D.L. 55 defendants knew that

Ohio was unwilling to settle its claims against "the Four Seasons insiders" (Clark et al.) unless Ohio received something more than had been offered to it by the Chapter X Trustee.

The attorneys for Ohio were never told that Ohio was a member of one of the classes which this court had indicated would be designated conditionally and tentatively for pretrial and discovery purposes in M.D.L. 55 if the settlement negotiations fell through. No attorney for Ohio asked about the classes in M.D.L. 55 and no other attorney volunteered the information, evidently believing that the attorneys for Ohio were aware of the situation.

The attorneys for Ohio and for the Chapter X Trustee agreed upon the terms of their settlement on September 13, 1972; Gretick, the attorney who was in active charge of the case for Ohio, went to Oklahoma City on September 19 to work out the terms of the joint application. Bailey, the attorney for the Trustee, left for Baltimore on September 20, and was present when the terms of the settlement of the M.D.L. 55 class claims and the Trustee's claims against Clark et al. were finally agreed upon and when the September 21 order of this court was signed. See 58 F.R.D. at 32 et seq. In that order the classes were defined as follows:

> "(a) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;

"(b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper."

Bailey returned to Oklahoma City that evening and on September 22 he and Gretick completed work on the joint application for approval of the Ohio claims in the Chapter X proceedings. Bailey told Gretick that the M.D.L. 55 order had been signed, and that "the case had been settled around Ohio".

The court finds that Bailey and all the M.D.L. 55 lawyers on both sides assumed that Ohio would opt out when it received the notice called for by the order of September 21. That was the reason the attorneys who prepared the settlement papers included therein the reservation of the rights of the M.D.L. 55 defendants to assert their claims and causes of action, including cross claims and claims for contribution and indemnity, which relate to or arise out of or in connection with the Ohio $4,000,000 loan and the litigation relating thereto. See n. 12, below.

The notice and the copy of the order which accompanied the notice made it quite clear that the settlement of the class actions was intended by all parties thereto to cover all claims which had been or could be asserted by or on behalf of the classes as defined in the order, arising out of or relating to any act or omission relating to the Four Seasons companies, or relating to the business, management or financial statements of any of the Four Seasons companies,

or transactions in the securities or commercial paper of any of the Four Seasons companies.

The notice of the proposed settlement provided for in this court's order of September 21, 1972, was duly published in The Wall Street Journal, as required by the order. Moreover, two copies of the order, notice and accompanying papers were mailed to Ohio, one addressed to State of Ohio, c/o Attorney General, and the other to William Brown, Attorney General. The return receipts indicate that both mailings were delivered to the office of the Attorney General, one on October 6 and one on October 10, 1972. One set found its way into Gretick's file; the other has not been accounted for.

Gretick was in Oklahoma City on October 12, 1972, in connection with the hearing on the settlement of Ohio's claims in the Chapter X proceedings. He had not read the M.D.L. 55 order of September 21 or the notice. Bailey showed him a copy of the order; Gretick "riffled" through it without reading it carefully, and asked Bailey to mail him a copy. That was not done. The most reasonable inference is that somewhere in the chain of command an underling knew that two copies of the order had already been sent to the Attorney General of Ohio and assumed that a further mailing was unnecessary.

Because of the death of his father, Gretick left the Attorney General's office two weeks later to return to his old law firm, and was busy in the meantime transferring his cases to other assistants. Ronald B. Brown was made lead counsel in the Four Seasons cases. Late in October he looked at the many papers in the files, saw the M.D.L. 55 order of September 21, read the first page and thumbed through some additional pages, but assumed that Gretick had done what was necessary, in view of the date of the order.

No election to opt out was filed by Ohio.

The failure of Ohio to opt out was not discussed at the hearing on approval of the settlement held in Oklahoma City on November 16, 17, 1972.[5]

In the judgment which was signed on November 30 and entered on December 4, 1972, the court, inter alia, (1) found that "the Trustee timely served by registered mail a copy of the Order and its exhibits, including the notice annexed thereto, upon all named plaintiffs in * * * State of Ohio v. Crofters, Inc. et al., * * * Shaul v. Crofters, Inc. et al. * * * and upon third party plaintiffs in * * * State of Ohio v. John D. Herbert, et al.", and (2) stated that "[a]ll of the findings and determinations made in the Order, whether conditional, *prima facie* or absolute, are confirmed and made absolute, unconditional and final", and Ordered, Adjudged and Decreed:

> "A. The proposed settlement is hereby finally approved and confirmed as being fair, reasonable, equitable and adequate, and the parties thereto are directed to perform all acts required by the proposed settlement in accordance with the terms of the Order and this final judgment.
>
> "B. The Plan of Distribution, including the administrative provisions thereof, is hereby approved and confirmed as being fair, reasonable, equitable and adequate.
>
> "* * *

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5. The only mention of Ohio at that hearing was when the attorney for Clark, discussing the defendants' chance of success if the cases went to trial, referred to the fact that in the hearing on Ohio's reclamation petition "the Federal District Court found that the State of Ohio, who falls within the classes here represented by the plaintiffs, had not proven that they had been defrauded, and that was affirmed by the Tenth Circuit." See also note 43 to Opinion No. 2, 58 F.R.D. at 37.

"I. Each and all of the class actions (Civil Actions Nos. 70-375, 71-349, 71-354, 71-582 and 71-353) and all settled claims are dismissed without costs, with prejudice and on the merits, as to all members of the classes, and each member of either or both of the classes is forever barred from the prosecution against the defendants in the class actions or anyone else of any and all settled claims.

"* * *

"L. Each member of the classes who claims a right to participate in the Class Settlement Fund shall be required to execute and deliver, as a part of his proof of claim, a good and sufficient release in the form contained in Exhibits D-1 and D-2 to the Order, and no proof of claim shall be allowed without a release in such form.

"* * *"

Provisions similar to Paragraphs I and L, quoted above, had been included in the order of September 21, referred to in the notice, because all the attorneys who negotiated the settlement and the attorneys who appeared at the confirmation hearing on November 16, recognized that the cases could not be settled unless the M.D.L. 55 defendants were protected against having to defend the cross claims or third-party claims which would likely be made against them or some of them in any suits brought by purchasers of Four Seasons securities against persons other than M.D.L. 55 defendants. The mere fact that a plaintiff has sued or may sue a broker or a registered representative alone or jointly with M.D.L. 55 defendants in connection with the purchase of Four Seasons securities does not remove the claims of such a plaintiff from the claims covered by the settlement. Something more must be shown, unless the plaintiff opted out. Otherwise, defendants might be

called upon to defend hundreds or even thousands of actions, and the purposes of Rule 23 would be thwarted. The settlement provided that any defendant might withdraw from and terminate the settlement if requests for exclusions from the classes were timely filed[6] by potential members having aggregate claims of $4,000,000 or more.[7]

Such right of withdrawal by a defendant had to be exercised by November 9, 1972, with certain rights of extension to December 8, 1972.

On or about December 5, 1972, after counsel for Clark had referred to the settlement during a pretrial hearing before Judge Rubin in State of Ohio v. Crofters, Inc., et al., Brown read the M.D.L. 55 order of September 21. After consultation with the Attorney General, Ohio's present independent counsel were consulted as to Ohio's involvement in M.D.L. 55. Ohio took no appeal from the judgment but, on December 21, 1972, filed its Motion to Obtain Relief from Final Judgment, and after conferences with counsel speaking for the principal defendants herein, the procedures to be followed were agreed upon and this court entered an order, set out in note 8 in the margin.[8]

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6. I. e., by November 1, 1972, the last day for filing such requests fixed by the order of September 21.

7. Calculated in accordance with the terms of the settlement agreement.

8. "Upon the motion of the State of Ohio for permission to file a conditional proof of claim, and upon assurance by Special Counsel to the Attorney General of Ohio that Ohio will not file an appeal from the judgment entered herein on December 4, 1972,

"It is Ordered this 29th day of December, 1972, that the State of Ohio be authorized to file a contingent proof of claim in the form authorized by this Court's order of September 21, 1972; that such proof of claim shall be null and void and of no effect if Ohio's motion for relief pursuant to Rule 60(b) is finally granted; and that such proof of claim shall become fully effective and unqualified if Ohio's motion pursuant to Rule 60(b) is finally denied. A copy of this order shall be attached to and become a part of the proof of claim to be filed by Ohio pursuant hereto."

Discussion

The Interrelation of Rule 60(b) and Rule 23

In this case Rule 60(b) and Rule 23 must be read and considered together. Rule 60(b), the relevant portions of which are set out in n. 1, above, is broadly worded to permit the court to avoid injustice.

Rule 23 is designed to avoid a multiplicity of lawsuits while protecting the substantive rights of plaintiffs and defendants. The notice provisions of Rule 23 (as amended effective July 1, 1966) are designed to provide due process and, at the same time, achieve finality in class litigation.[9]

[1] A claim of mistake, inadvertence, surprise or excusable neglect, a claim that the judgment is void, and any other reason alleged to justify relief under Rule 60 from the operation of the judgment, must be considered in the light of the purposes and provisions of Rule 23.

[2, 3] A too liberal application of Rule 60(b) in class actions would undermine the finality of judgments entered therein and would discourage settlement of such actions. Defendants will be loath to offer substantial sums of money

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9. Rule 23(c)(2) provides:

"(2) In any class action maintained under subdivision (b)(3) the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Rule 23(e) provides:

"(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

in compromise settlement of class actions unless they can rely on the notice provisions of Rule 23 to bind class members. Courts favor the settlement of controversies; fair compromise settlements are particularly important in complex, multi-party litigation which is likely to require many months of court time over a period of years.

60(b)(1)—Mistake, Inadvertence or Surprise

[4] In this case two individual notices were delivered to and received by the office of the Attorney General of Ohio, one on October 6 and one on October 10, 1972.[10] No action pursuant to the notice and order was taken by any one on behalf of Ohio until after December 8, 1972. If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent.

There was no mistake on the part of Ohio which would warrant relief on that ground in this case under Rule 60(b). Nor was there any surprise or inadvertence, as those terms are used in that Rule.

If mere failure to read a notice sent under Rule 23 were held to constitute either mistake, inadvertence or surprise sufficient to obtain relief under Rule 60(b), few judgments in large class actions would be free from successful attack, and settlement of such cases would be seriously discouraged.[11]

Ohio must prevail in this case, if at all, on one or more of its other claims.

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10. Notice was also duly published in The Wall Street Journal, in accordance with the order of September 21.

11. The court does not imply that published notice may not be sufficient in appropriate cases. Under the facts of this case, both Rule 23 and the order required that individual notice be sent to the State of Ohio.

60(b)(1)—Excusable Neglect

[5] The attorneys for Ohio were negligent in not reading the notice and order which was sent to them. The question is, whether such neglect was excusable under all the circumstances.

The fact that Ohio had one or more independent suits pending against some of the M.D.L. 55 defendants does not entitle Ohio to relief from the judgment. Nor does the breakdown of internal procedures in the office of the Attorney General. This court agrees with and adopts the reasoning of Judge Metzner in *Supermarkets General Corp. v. Grinnell Corp.*, (S.D.N.Y.1973), reported in 59 F.R.D. 512.

If Ohio's attorneys had read the notice and order, Ohio would have opted out. The attorneys for plaintiffs and the attorneys for defendants who negotiated the settlement expected Ohio to opt out. The provision in the order of September 21 preserving defendants' claims against Ohio[12] was included with the assumption that Ohio would opt out; indeed, Clark has stated that he will dismiss his claims against Ohio if Ohio's attack on the judgment herein fails.

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12. That provision of the order was as follows:

"19. The consenting defendants expressly reserve all rights, claims and causes of action, including cross-claims and claims for contribution and indemnity, if any, which they may have against any persons whomsoever, including any other consenting defendants (other than the debtor estates in the reorganization proceedings, the Trustee, their attorneys, past or present, and the resulting reorganized company and its subsidiaries and affiliates) which relate to, or arise out of or in connection with, the State of Ohio's loan of $4,000,000 to America, any act or omission with respect to such loan, the litigation relating thereto, and claims, cross-claims and third-party claims asserted in State of Ohio v. Crofters, Incorporated, et al., Civ.-72-81 (United States District Court for the Southern District of Ohio), Shaul v. Crofters, Incorporated, et al., 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas), and State of Ohio v. John D. Herbert, et al., 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas). * * *"

These facts, alone, would not justify a decision in Ohio's favor on its motion. But they help support a finding, which this court makes upon all the evidence, that although Ohio's attorneys knew of the M.D.L. 55 class actions, they conducted their negotiations with the attorney for the Trustee, participated to some extent in the September 7 meeting with attorneys for the M.D.L. 55 defendants and prosecuted their suits in Ohio against various defendants, including some of the M.D.L. 55 defendants, in the belief that Ohio would not be included in the M.D.L. 55 classes. The attorneys for the M.D.L. 55 defendants and the attorney for the Chapter X Trustee did nothing to dispel this belief of Ohio's attorneys. This court does not criticize the attorneys for the M.D.L. defendants or for the Trustee, and does not find that they made any misrepresentation or deliberately misled Ohio's attorneys. But the course of the dealings during the period from July 20, 1972 (when this court indicated the classes which it would establish for discovery and pretrial purposes if the cases were not settled),[13] through September 22, 1972 (when the joint application for the settlement of Ohio's claim in the Chapter X proceedings was completed), lulled Ohio's attorneys into the belief that the statement made to them "that the case had been settled around Ohio" meant that Ohio was not involved in the M.D.L. 55 settlement. On October 12, 1972, Gretick, the Ohio attorney in charge of the case, saw the M.D.L. 55 order of September 21 in Bailey's office, "riffled" through it and asked Bailey to send him a copy, which was not sent. But the evidence does not show that Gretick read enough to learn that Ohio was intended to be included in the M.D.L. 55 settlement, or that Bailey told Gretick that Ohio was included.[14]

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13. See Opinion No. 2, 58 F.R.D. at 30, 31.

14. Again, the court implies no criticism of Bailey.

The facts just recited *explain*, although they do not *excuse*, the neglect of Gretick and Brown to read the notice and order or the neglect of the attorneys for Ohio to cause Ohio to opt out.

60 (b) (4)—Ohio's Contention That the Judgment was Void As To Ohio

Apart from any constitutional requirement of due process, Rule 23 requires that in all class actions:

(a) (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class";

(a) (4) "the representative parties will fairly and adequately protect the interests of the class"; and

(c) (2) in any class action maintained under (b) (3), which includes the M.D.L. 55 class actions, "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Subsection (e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

If these requirements are met, the requirements of the Due Process Clause are satisfied.

Notice

The evidence shows and the court finds that the required notice was given.[15] The evidence further shows that two copies of the notice were actually received by Ohio.

[6] But where a party has not appeared, although he has received due notice, the judgment will not be binding upon him unless he has had representation which meets the tests of Rule 23(a)(3) and (4), quoted above. Adequacy of representation cannot take the place of notice; nor can notice take the place of adequacy of representation.

Adequacy of Representation

In the order of September 21, 1972, the court found and determined, for the purpose of effectuating the proposed settlement and subject to the effectuation thereof, that with respect to each of the two classes established by that order the requirements of Rule 23(a)(3) and (4), quoted above, were met, as well as the other applicable requirements of Rule 23. Following the hearing on November 16, at which an attack was made on the adequacy of representation in connection with the settlement, this court, for the reasons stated in Opinion No. 2 herein, 58 F.R.D. at 40, 41, entered a judgment on December 4, 1972, which confirmed those findings.

The evidence offered by Ohio and the M.D.L. 55 defendants in support of and in opposition to Ohio's pending motion, together with the record of the proceedings in

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15. The notice called for by 23(c)(2) and the notice called for by 23(e) were combined in one notice, for reasons explained in Opinion No. 2, 58 F.R.D. at 31. The court determined after the hearing on November 16, 1972, that adequate notice had been given, and adheres to that determination.

M.D.L. 55, summarized in Opinion No. 2, 58 F.R.D. 27 et seq., show that the findings were justified with respect to almost all claims of purchasers of Four Seasons securities.

Whether they were justified with respect to the claims asserted by Ohio requires a consideration of two points raised by its attorneys: (1) that several features distinguish Ohio's claims from the claims of all other class members, and (2) that the class representatives could not and did not fairly and adequately protect the interests of Ohio. Those contentions must be considered separately and together, along with all the facts bearing on Ohio's position.

Rule 23(a)(3)—Distinctive Features of Ohio's Claims —The Typicality Point

Ohio was a member of one of the classes described in paragraph 5(a) of the order, quoted above, because the promissory notes of Four Seasons Nursing Centers of America which it acquired were securities within the meaning of the Federal Securities Act of 1933 and the Securities Exchange Act of 1934. Ohio does not deny that the notes were securities within the meaning of those statutes; indeed most of its claims in State of Ohio v. Crofters, Inc., et al., in the Southern District of Ohio, are based upon its allegation that the notes were securities within the meaning of those statutes.

Most if not all of the claims asserted by Ohio in State of Ohio v. Crofters, Inc., et al., in which Clark, Gray, Mee, Andrews and McCollum were among the defendants, are essentially similar to the claims of the M.D.L. 55 class representatives. The fact that some of the claims were asserted under the securities laws of the State of Ohio or the common law, rather than under the federal statutes, is

not sufficient to distinguish those claims from the class claims in M.D.L. 55.[16]

The claims asserted by Ohio in its state court suit against Herbert, the State Treasurer, Gardner, an employee in the office of the Treasurer, and the sureties on their bonds, are not essentially similar to the claims of the M.D.L. class representatives.[17] On the other hand, the third-party claims asserted against Clark, et al., by the defendants in that case are essentially similar to the claims of the M.D.L. 55 class representatives.

Ohio relies upon several features of its claims to support its contention that the requirements of Rule 23(a)(3) have not been met.

Before discussing those features, it should be noted that Rule 23(a)(3) requires that the claims of the representative parties be "typical" of the claims of the class, not that they be "co-extensive with" or "identical to" those of other class members. See WRIGHT & MILLER: FEDERAL PRACTICE AND PROCEDURE, CIVIL: §1764; 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2.

Ohio seeks to distinguish its claims on several grounds. It argues:

(1) That it made three loans to Four Seasons in March 1970 which were evidenced by promissory notes bearing interest at 9½% per annum and maturing essen-

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16. The allegations of plaintiff in the case of Shaul v. Crofters, Inc., et al., in an Ohio state court, are generally similar to the claims in State of Ohio v. Crofters, Inc., et al., but the relief sought is injunctive. In S.E.C. v. Crofters, Inc., et al., the relief sought was also injunctive. See opinion of Judge Rubin therein, 351 F.Supp. 236 (S.D.Ohio 1972).

17. See discussion of the loans to Four Seasons made by Ohio contained in the opinion of Judge Rubin in S.E.C. v. Crofters, Inc., Clark et al., 351 F.Supp. at 249 et seq.

tially in two years; (a) that Ohio bargained for interest return alone and not for any present or prospective equity position in Four Seasons; (b) that Ohio's sole concern was in short-term liquidity, not long-range growth; and (c) that accrued interest upon Ohio's loans amounted to $1,068,672.92 on January 2, 1973.

(2) That its loans were privately negotiated through a finder-broker; (a) that the loans required no registration statement, prospectus, other reporting, or professional underwriting group; (b) that the Ohio statute purportedly authorizing the loans required that the "commercial paper notes" be "rated prime by" NCO, a division of Dun & Bradstreet, before Ohio could invest therein; (c) that the requisite approval of NCO was obtained by the finder-broker with the cooperation of Four Seasons and exhibited to Ohio; and (d) that Ohio relied not only on Four Seasons' financial statements dated June 30, 1969, and December 31, 1969, but also on the prime rating given by NCO.

(3) That the promissory notes given to Ohio by Four Seasons were represented to be commercial paper.

[7] As we have seen, the requirement of Rule 23(a)(3) is that the claim of the representative parties be "typical" of the claims of the class, and that Rule 23(a)(3) does not require that the claims of the class representatives be "co-extensive with" or "identical to" those of other class members. The requirement of typicality may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other members of the class. WRIGHT & MILLER, op. cit., § 1764, p. 613.

Each member purchased his security or securities in a separate transaction from those of the other class mem-

bers, and the fact patterns necessarily varied. See discussion of "Classes and Subclasses" in Opinion No. 2 herein, 58 F.R.D. at 38 et seq. The members of the classes bought their securities through various brokers and registered representatives of Walston and others, during one of the public offerings or in the after-market, or in one of the private placements. All relied on alleged misrepresentations embraced in the general conspiracy theory advanced by class representatives and covered by the alleged violations of the securities laws. All of the asserted claims gave rise to potential cross-claims and third-party claims and other problems which made class action treatment and settlement of the cases desirable from the point of view of the plaintiffs, the potential plaintiffs (members of the classes), the defendants and the public.

After considering all of the evidence and arguments, the court concludes that the claims of the class members were typical of the claims of Ohio asserted in State of Ohio v. Crofters, Inc., et al., and in the third-party complaints against Clark and others in State of Ohio v. Herbert, et al., but were not typical of the claims asserted by Ohio in its complaint against Herbert, Gardner and their sureties.

Rule 23(a)(4)—Adequacy of Protection by Class Representatives

In support of its contention under Rule 23(a)(4) that the class representatives and their counsel did not fairly and adequately protect its claims, Ohio advances the same distinctions between its claims and the claims of the class representatives which it advanced in support of its argument under (a)(3).

Those distinctions do not, standing alone, show a lack of adequate representation and protection—again, with the

exception of the claims against Herbert, Gardner and their sureties.[18] But the distinctions referred to must be considered in connection with the terms of the settlement embodied in the order of September 21 and the subsequent judgment, and the events which preceded and followed the order of September 21.

The terms of the settlement which have the most important bearing on the issue under consideration are: (1) the provision that claims of class members who had been Class C Creditors in the Chapter X proceedings should be reduced to 10% of the face amount of the securities on which their claim is based; and (2) the provision which reserved the rights of the M.D.L. 55 defendants against Ohio. See n. 12, above.

(1) After hearing all of the evidence and arguments on the Ohio motion, the court adheres to the finding and conclusion that the Plan of Distribution, including the 90% reduction in the claims of those who had been Class C Creditors was fair and reasonable under all the circumstances. It was not objected to by any of the persons whose claims were so reduced, and a large percentage of the class members who had been Class C Creditors in the Chapter X proceedings have filed claims and releases herein pursuant to the settlement. It is true, however, that none of the class representatives had been a Class C Creditor in the Chapter X proceedings, and there is some force in Ohio's argument that the class representatives and their attorneys could

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18. Wright & Miller, op. cit., state in § 1769: "Courts often have stated that the interests of the representatives must be coextensive with those of the class in order to satisfy Rule 23(a)(4). This does not mean that their positions have to be identical; rather, what seems to be intended by these judicial statements is that the representatives and the class members should share common objectives and legal or factual positions."

not adequately represent it in the settlement.[19] It is not necessary, however, to decide this point alone, because it must be considered along with the other provisions in the order dealing with the Ohio cases set out in n. 12, above, and the negotiations and conversations of the attorneys for Ohio with the attorneys for the Trustee in the Chapter X proceedings and with the attorneys for some or all of the defendants in M.D.L. 55.

The court does not suggest that the Trustee and his attorney or any of the M.D.L. 55 attorneys acted unfairly or in bad faith with respect to Ohio. The court does not agree with the argument advanced by Ohio that the different positions taken by Ohio and the attorneys for the Class G defendants on several matters in the Chapter X proceedings created such an animosity or conflict as would, standing alone, prevent the class representatives in M.D.L. 55 from fairly and adequately protecting the interests of Ohio.

There is, however, the provision in the settlement preserving the claims of the M.D.L. defendants with respect to the Ohio transactions. See n. 12 above. As this court has found, those provisions were included with the expectation on the part of everyone that Ohio would opt out. Viewed in the light of Ohio's failure to opt out, those provisions cannot be justified. Indeed, Clark has offered to release his claims if Ohio's pending motion to be relieved from the judgment herein does not prevail. But the matter is not so simple; many claims, counterclaims, cross-claims and third-party claims, actual and potential, are involved.

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19. The situation is different from what it would have been if the class actions had proceeded through further pretrial to a possible trial or trials. Here we have not only a settlement, but a settlement which included special provisions with respect to the Ohio claims.

[8] When the differences between the claims of Ohio and other class members and the provisions of the order and judgment dealing specifically with the Ohio and Ohio-related claims are considered together, Ohio has made a strong case that the judgment should be held void as to all the claims of Ohio.

Rule 60(b)(6)—Other Reasons Justifying Relief from the Operation of the Judgment

To the considerations referred to in the last preceding paragraph must be added the lulling effect of the dealings which the attorneys for Ohio had with the attorney for the Chapter X Trustee and the attorneys for some of the M.D.L. 55 defendants, discussed under the heading "60(b)(1)—Excusable Neglect", above.

The court concludes that the totality of the evidence requires that Ohio be relieved from the operation of the judgment.[20]

Ohio should be added to the list included in Exhibit A, referred to in paragraph H of the judgment entered herein on December 4, 1972, and will be bound by the provisions of said paragraph H.

Counsel should agree upon a proper order within 15 days.

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20. This court intimates no opinion with respect to the possible res adjudicata or collateral estoppel effect of any prior decision in the Chapter X proceedings or elsewhere.

SUPPLEMENTING OPINION OF THE DISTRICT COURT DESIGNATED "OPINION NO. 4A"

(Dated July 25, 1973)

M.D.L. Docket No. 55

UNITED STATES DISTRICT COURT
For the Western District of Oklahoma

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

MOTION OF OHIO FOR RELIEF FROM JUDGMENT

THOMSEN, *District Judge**

The Court finds that no attorney or other representative of Arthur Andersen & Co. was present at the meeting in New York referred to on page 12 of Opinion No. 4. However, the chief attorney for Walston & Co., Inc., who was present at the meeting with counsel for Ohio on September 8, 1972, was acting as the defense counsel primarily involved in negotiating the settlement and acted as informal liaison counsel for the defendants in communications with the Court respecting the settlement of the M.D.L. 55 cases.

The attorneys for Arthur Andersen & Co. were parties to the negotiations which led to the inclusion of paragraph 19 in the order of September 21, 1972, and this Court finds that under all the facts and circumstances and the inferences which may reasonably be drawn therefrom, Arthur Andersen & Co. should be held to have participated in the unintentional and non-deliberate "lulling" which (1)

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*Of the District of Maryland, sitting by designation.

this Court found in its Opinion No. 4 to "explain", but not to "excuse" the neglect of Ohio's attorneys, and which (2) coupled with the strong case made by Ohio that the judgment entered herein on November 30, 1972, should be held void under Rule 60(b)(4) as to all the claims of Ohio, required that Ohio be relieved from the operation of the judgment under Rule 60(b)(6).

/s/ ROSZEL C. THOMSEN
United States District Judge

JUDGMENT OF THE DISTRICT COURT

(Dated August 17, 1973)

M.D.L. Docket No. 55

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

This cause came on to be heard upon the motion filed by the State of Ohio pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, grounds (1), (4) and (6) thereof, to obtain relief from the final judgment herein signed on November 30, 1972, and entered on December 4, 1972.

Upon consideration of such motion, together with the evidence offered in connection therewith, the oral arguments of counsel and their written briefs, and for the reasons stated in Opinion No. 4 herein, as supplemented by Opinion No. 4A, the Court concludes that such motion

should be overruled as to ground (1) of Rule 60(b), but that such motion should be granted upon ground (6) of Rule 60(b). This decision makes it unnecessary for the Court to decide whether relief should be granted under ground (4) of Rule 60(b), but the Court adheres to what is stated in Opinion No. 4 with respect thereto.

It is therefore ordered, adjudged and decreed that the motion of the State of Ohio to obtain relief from the final judgment herein signed November 30, 1972, and entered December 4, 1972, be, and it is hereby granted upon ground (6) of Rule 60(b) of the Federal Rules of Civil Procedure and that the State of Ohio be, and it hereby is, relieved from the operation of such judgment.

It is further ordered that Ohio be added to the list included in Exhibit A referred to in paragraph H of the judgment above mentioned and that Ohio be bound by the provisions of said paragraph H.

This Court believes and intends that this judgment constitutes a final decision of this Court for the purposes of 28 U.S.C.A. 1291. The time for filing notice of appeal shall commence to run when this judgment is entered by the Clerk of the United States District Court for the Western District of Oklahoma in accordance with the terms of Rule 79(a) of the Rules of Civil Procedure.

If, however, this judgment is not appealable under § 1291, this Court is of the opinion that it is an order which involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. 1292(b) may materially advance the ultimate determination of this litigation.

Whether relief is granted under Rule 60(b)(4) or (b)(6), the Court has the discretion to "impose such terms as are just". Under neither ground is the Court required to impose costs and/or attorneys' fees or expenses on any party or parties.

In this case the Court concludes that under the facts set out in Opinion No. 4 herein, as supplemented by Opinion No. 4A, each party should bear its own costs, and that this Court should not require any party to pay the attorneys' fees or expenses incurred by any other party or parties.

It is further ordered that one of the terms upon which relief is granted is that Ohio shall not be entitled to include in any damages it may recover against any M.D.L. 55 defendant, the costs and/or attorneys' fees or expenses incurred by it in connection with the motion which is the subject of this judgment. Nor should any defendant or third party defendant be entitled to claim as a set-off to any recovery by Ohio against him (or it) the costs and/or attorneys' fees or expenses incurred by him (or it) in connection with the motion which is the subject of this judgment. If such a claim is made by any such defendant, the provisions of this paragraph restricting Ohio shall not apply to such defendant.

/s/ ROSZEL C. THOMSEN
Senior United States District Judge

OPINION OF THE DISTRICT COURT DESIGNATED "OPINION NO. 2"

(Dated December 18, 1972)

M.D.L. Docket No. 55
(All Cases.)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION

APPROVAL AND CONFIRMATION OF SETTLEMENT

THOMSEN, *District Judge.**

This opinion sets out the reasons why the court has approved and confirmed, after notice and hearing, a settlement of the class actions filed in or transferred to this district and assigned to me for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407,[1] and of all claims which have been or could be asserted by or on behalf of the classes or any member thereof (except those who opted out) and which are specified in the notice to the members of the classes.

The actions were brought by persons who had purchased securities issued or guaranteed by Four Seasons Nursing Centers of America, Inc. (America), or Four Seasons Equity Corporation (Equity) and who claimed to have

*Of the District of Maryland, sitting by designation.

1. In re Four Seasons Securities Laws Litigation, 328 F.Supp. 221 (Jud.Pan.Mult.Lit.1971), and subsequent orders of the Panel.

sustained losses as a result thereof.[2] The defendants in the several suits include officers and directors of America, officers and directors of Equity, Walston & Co., Inc. (the managing underwriter of the public stock offerings of America and Equity), some of Walston's officers and employees, Montgomery Company (a limited partnership composed of some of Walston's officers and stockholders), Arthur Andersen & Co. (the accounting firm which prepared and certified several audit reports), and others.

The settlement also includes certain civil actions and claims filed and asserted by the Trustee appointed in the Chapter X proceeding for the reorganization of the Four Seasons companies pending in this court.[3] The settlement with respect to those claims has been approved by Judge Eubanks, after a hearing in the Chapter X proceedings.

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2. The classes were variously defined in the several complaints and in counsels' statements of position on the class issue. For the purposes of the settlement they were defined in the order and notice, summarized under the heading "Settlement", below. They comprise, generally, all persons (with certain exceptions, e.g. defendants and partners of defendants) who at any time from May 9, 1968, to July 22, 1970, purchased or acquired securities or commercial paper issued by any of the Four Seasons companies and who suffered a loss thereon or after July 22, 1970, still owned any such securities or commercial paper.

3. The Four Seasons corporations involved in the reorganization proceedings are Four Seasons Nursing Centers of America, Inc. (America), Debtor, Four Seasons Overseas, N.V. (Overseas), Embassy Construction Co., Inc. (Embassy), National Medical Supply, Inc., Four Seasons Franchise Centers, Inc. (Franchise), subsidiaries of America, and Four Seasons Equity Corporation (Equity), Debtor, and FSN Corportion (FSN), a subsidiary of Equity. Other "Four Seasons companies" referred to in the settlement papers, particularly the order and notice, include Four Seasons United, Four Seasons Investors, Four Seasons Nursing Centers of the West, Inc., Four Seasons Nursing Centers of the South, Inc., and other related or affiliated companies and partnerships. The outstanding common stocks of America and Equity were publicly held. America owned all the common stock of Overseas, Medical and Embassy, 80% of the common stock of Franchise and 30% of the common stock of FSN. Equity owned 20% of the common stock of Franchise and 70% of the common stock of FSN.

Because the actions brought by a few plaintiffs who have opted out are still pending in this multidistrict proceeding (M.D.L. 55) and because grand jury proceedings are pending in the Southern District of New York, this opinion will include in the historical statement only facts which appear to be undisputed, unless the finding is preceded by a reference to the source, e.g. "The SEC report found". All facts stated herein are found only for the purpose of ruling on the settlement. The SEC report referred to is the Advisory Report of the Securities and Exchange Commission on the Proposed Plan of Reorganization, dated March 16, 1972, which was filed in the Chapter X proceedings.[4]

Historical Statement

America, a Delaware corporation, was organized on September 11, 1967, to engage in the development, construction and management of nursing centers throughout the United States. Upon organization, it acquired the interests in twelve such enterprises owned by defendants Jack L. Clark, Amos D. Bouse,[5] and Tom J. Gray, who, since 1963, had been associated in the construction and operation of nursing centers. At the time of this acquisition, five nursing homes were in operation and two were under construction.

In exchange for their interests, which had an aggregate cost to them of $53,522 and an underlying book value

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4. The findings and conclusions contained in that report have never been adjudicated, but the recommendation of the SEC that the pending plan of reorganization be approved, with certain amendments, was adopted in the Chapter X proceedings. The SEC also stated that it had no objection to the present settlement.

5. Amos D. Bouse died in 1971. His administrators have been substituted as parties defendant in those cases in which he was sued. Both Amos D. Bouse and his administrators will be referred to herein as "Bouse".

of $500,000,[6] Clark, Bouse and Gray received 864,000 shares of America common stock. Walston & Co., Inc. (Walston), purchased 36,000 common shares for $45,000, and privately sold 100,000 shares of 6% convertible preferred stock for $1 million; half of those shares were taken by Montgomery Company (Montgomery), a partnership consisting of certain officers and stockholders of Walston. The preferred stock was converted into 300,000 shares of common prior to the second public offering of America common stock.

A vice-president of Walston (McCollum), together with Clark, Gray, Bouse and America's general counsel (Andrews), became the initial directors of America. Those persons remained the directors of America until shortly before the Chapter X proceeding, filed on June 26, 1970. Walston became the managing underwriter for America and for Equity and a co-underwriter for Overseas.

On May 9, 1968, America made its first public offering of 300,000 shares of common stock at $11 a share. About six months later, on November 26, 1968, it sold an additional 100,000 common shares at $58.50 per share. As a result of a two for one split in March 1969, the 1.6 million shares were converted into 3.2 million shares. Other non-public transactions increased the outstanding shares to 3,445,651 at the time of the Chapter X proceeding. Net proceeds to America from these offerings, after commissions, totaled $8,536,000. Included in the sales to the public were secondary offerings of 557,800 shares by the original stockholders. Net proceeds to them, after commissions, totaled $27,986,200. In both offerings, Walston acted as representative of the other underwriters.

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6. This figure is based upon the May 1968 America Prospectus. Clark, Bouse and Gray were "selling stockholders" in that offering.

The registration statement and the prospectus of the first public offering contained America's financials as of June 30, 1967, and December 31, 1967, with Andersen's certified audit report of April 15, 1968.[7] America's annual report for its fiscal year ended June 30, 1968, was delivered to America on August 21, 1968, and was released to the public in September or October. The registration statement and the prospectus of the second public offering contained America's financials as of June 30, 1968, with Andersen's audit report dated August 21, 1968, which included similar certificates to those set out in footnote 7 in the margin.

On November 12, 1968, America common stock was admitted to trading on the American Stock Exchange. It began almost immediately to rise sharply in price on heavy volume. By October 31, 1969, it had risen in price from $29.50 to $90.75 per share (adjusted for a two-for-one split).

On November 6, 1968, Equity and FSN were incorporated in Delaware. Prior to the organization of

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7. Andersen's certificate was in the usual form, namely: that their "examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances"; and that in their opinion "the accompanying consolidated balance sheet and consolidated statements of operations, retained earnings (deficit) and capital surplus present fairly the financial position of Four Seasons Nursing Centers of America, Inc. and subsidiaries as of December 31, 1967, and the results of their operations for the three years ended June 30, 1967, and the six months ended December 31, 1967, all in conformity with generally accepted accounting principles applied on a consistent basis after giving retroactive effect to the change (which we approve) in method of providing depreciation referred to in Note 6 to the consolidated financial statements."

Equity, America had tried to sell to local investors the interests in the centers it or its predecessors had built.[8]

The public financing enabled America to initiate an extensive program for the construction of nursing centers, each of which generally was separately incorporated. In most cases the nursing centers, when completed, were under America's management pursuant to long-term contracts. As indicated in the prospectus of its first public stock offering, America was then managing 14 completed centers. It had nine under construction, had contracted for seven more, and had taken preliminary steps to develop an additional twenty.

America was expected to carry the costs through construction and to find permanent mortgage and equipment financing. The SEC report states that in addition, since a nursing center was not expected to be profitable for some time after its opening, America was obliged to advance substantial sums to cover the cash deficits of these centers; much of these advances ultimately proved uncollectible.[9]

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8. The SEC report states that such stock equity normally represented about 10% to 15% of the total price, and in some instances less; the sale efforts were only partially successful; America retained 100% of the equity in one of the fourteen centers under its management, 50% in three, and 30% in two.

9. America's other corporate activities included its supply division, which performed centralized purchasing and warehousing services for the managed centers, and the management division. Shortly before the Chapter X proceedings, America organized Medical, a wholly-owned subsidiary of America, to engage in the medical supply business and to serve the centers under America's management and any other customers. The Chapter X proceedings brought this venture to an abrupt end.

Embassy was organized in 1968 to engage as contractor on behalf of America in those states in which America did not wish to undertake construction directly. The SEC report states that Embassy had virtually no capital of its own, and in its operations it incurred substantial construction liabilities for which it was to be reimbursed by America.

The SEC found that America's ambitious program and its operating and other needs required substantial cash outlays, and that to meet these requirements it was necessary for America to increase its volume of sales and profits. America's reported revenues increased from $2.2 million in the year ended June 30, 1967 to $19.3 million in the year ended June 30, 1969. Reported net income increased from $300,000 to $2.7 million for the same periods, with a corresponding spectacular increase in per share earnings.

From the very beginning profits on construction, anticipated at 50% of actual costs, or better, were almost the sole source of America's reported earnings. Construction revenues for the year ended June 30, 1968 were reported as $5.25 million, as against costs of $3.25 million, or a gross profit, before overhead, of 60% of cost.

The SEC concluded that without bona fide sales, America was not in a position under established accounting principles to record these construction profits as income.

The SEC found that Equity and FSN were organized pursuant to an agreement, dated November 4, 1968, entered into by America, Clark, Bouse and Gray, with four individuals who became the sole directors of Equity. Their principal offices were in Oklahoma City, as was America's.

Equity issued initially 120,000 shares of common stock at $11 per share. One-third of these shares were issued to Equity's four directors, the remaining two-thirds to America, Clark, Bouse and Gray. It was agreed that the latter shares were to be non-voting while held by them.

On February 27, 1969, Equity sold publicly, through Walston, 545,000 shares of its common at $11. At the same time it also sold to 14 institutional investors 135,000 shares and $714,000 principal amount of 6½% junior subordinated convertible debentures. Net proceeds to Equity from these offerings were $7.9 million, after underwriters' commissions.

Andersen had prepared a report on examination of Equity's balance sheet as of December 3, 1968, and another as of February 14, 1969. The latter statement, certified in the customary manner, was included in the Equity prospectus. Andersen also (a) prepared and delivered on July 22, 1969, their auditor's report on examination of Equity's balance sheet as of June 30, 1969, and a consolidated balance sheet and related statements for Equity and subsidiaries as of June 30, 1969, which was released to the public about September 11, 1969, and (b) prepared and delivered on September 9, 1969, a report of examination of America's consolidated balance sheet and related statements as of June 30, 1969, which was promptly released to the public.[10]

FSN was to serve as a joint subsidiary of Equity and America, Equity taking 70% and America 30% of its $1,000 capital stock. Title to completed nursing centers was to be transferred to FSN by America and Equity, from time to time, as security for 7½% first mortgage notes, maturing July 1, 1987, to be issued by FSN as part of the permanent financing of these nursing centers. These notes would be issued under an open-end indenture, all notes being secured by a blanket mortgage. The notes

10. The annual reports of America and Equity were released to the public on October 31, 1969.

would be fully guaranteed by Equity, America's guarantee to be limited to 30%.[11]

In the year and half of their joint corporate activities, about 100 projects were initiated by America and Equity. By June 26, 1970, the date of the Chapter X proceeding for America, 25 joint nursing centers were completed and in operation and at least as many under construction. In addition, 31 sites had been acquired and others were under contract with escrow deposits. These properties represented an investment of about $43 million in land, buildings and equipment.

The SEC concluded that aside from their role in supplying some of the financing, Equity and FSN contributed little to this massive venture. Its report stated that the directors of Equity and FSN acknowledged that they had no previous experience in this business, and neither Equity nor FSN attempted to develop its own staff or organization; that Equity dealt only with America, and typically each project was organized as a general partnership between them.

Under the standard partnership agreements, America was employed as general contractor to construct the facility and to supply the equipment, both at a profit, and to use its best efforts to secure the necessary financing commit-

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11. The SEC found that the preorganization agreement of November 4, 1969, was linked to mortgage commitments from the same 14 institutional investors who purchased the debentures and part of the stock of Equity; the commitments, terminating June 30, 1971, were for the purchase of not more than 19.5 million of mortgage notes. The investors agreed to buy FSN 7½% mortgage notes for 62% of the lesser of the amount determined, inter alia, by the actual cash expenditures for the completed nursing centers conveyed to FSN or the appraised value thereof. Clark, Bouse and Gray agreed to buy FSN 7½% subordinated notes for 13% of such amount. America and Equity agreed to provide the remaining 25% by the purchase of additional stock, 70% thereof by Equity and 30% by America.

ments. The SEC report stated that America was appointed "Governing Body" with exclusive authority over all aspects of center management and operation at a specified fee, and the partnership itself, meaning Equity, was expressly excluded from participating in any phase thereof; that America was also designated to prepare and keep custody of all partnership records, books and operational data; that the only matter expressly left to mutual agreement was the selection of the site, but America was designated to make the market survey to determine the feasibility of the project.

Under the partnership agreements for each facility, Equity and America were to share in the profits and losses of the partnership, 70% for Equity and 30% for America. This is the same ratio in which the contribution to capital was fixed for the two partners.[12]

The SEC found that America in its various capacities, dealt directly with creditors and suppliers in almost all phases of the operations and was initially responsible for payment of most of the costs, some land purchases being the principal exception. By far the largest expenditures were for construction, and under the construction contract with each partnership America was to receive progress payments on the contract price in five equal instalments, based on specified stages of completion. Its initial practice was to bill Equity for 70% of each earned construction instalment, which was usually remitted by Equity until it substantially exhausted its cash resources in November 1969. America billed 100% of its construction charges to the partnership center.

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12. In three instances in which outside investors were brought in, Equity's ownership was reduced accordingly. The project was either incorporated or continued as a partnership with the outside investor participating as a limited partner.

The SEC further found that the billing procedure soon broke down, due partly at least to malfunction of America's accounting system; that in preparing financial statements for the six months ended December 31, 1969, both companies found it necessary to adjust their book accounts by more than $10 million for unbilled construction; that at about this time, Equity ceased to record deficiencies in its partnership contributions; and that almost six months of intercompany liabilities were simply omitted from its books at the time the Chapter X proceedings began in June 1970. Nevertheless, construction profits continued to be the primary source of reported earnings of America until the Chapter X petition was filed. The other divisions made only a negligible contribution to earnings.

During the period from May 1968 through March 1970, Clark made many optimistic statements with respect to the projected earnings of America, which were not realized. These statements were published in various newspapers and included in market letters of broker-dealers recommending America stock.

Andersen prepared and delivered on March 22, 1970, its auditor's report on examination of Equity's balance sheet as of December 31, 1969; it was released to the public on March 30, 1970. It does not appear that a report of examination of America's balance sheet as of December 31, 1969, was ever released.

On April 29, 1970, America issued a release to the public that a loss was expected for the quarter ended March 31, 1970.[13]

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13. Clark takes the position that the loss resulted from (1) America's decision to reflect promptly a change in its "theretofore generally accepted" accounting procedures and to offset against third quarter earnings all previously recognized income from franchise fees, and (2) unanticipated cost overruns on construction sites in the Midwest coupled with possible embezzlement of company funds in the Chicago area.

The next day, April 30, the American Stock Exchange suspended trading in America stock. On May 12, 1970, the SEC ordered the first of a series of 10-day suspensions of trading.

After an investigation, the American Stock Exchange issued on March 1, 1971, a report dealing with "three possible violations" by Walston.[14] It is not necessary for this court at this time to set out or summarize the contents of the report or Walston's response, beyond stating: (a) that the report includes certain statements of fact, evidence, inferences and conclusions, which, if true and justified, would lend support to some of the claims made against Walston and other defendants by the plaintiffs in these class actions; and (b) that the reply contains certain statements of fact, evidence, inferences and conclusions, which, if true

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14. The "three possible violations" were referred to by Walston in its reply as "charges of wrongdoing" and were summarized in that reply as follows:

> "FIRST: That in and during the period December 1969 to April 1970 Walston, having confidential, non-public material information concerning [America] which was substantially adverse and unfavorable to that company engaged, by reason of such inside information, in a program of stock disposition, including acting as selling broker for certain 'insider' accounts.
>
> "SECOND: That in a period prior to January 8, 1969 when [America] announced a stock split, and in a period prior to April 7, 1969 when [America] announced a franchise program, Waltson, having confidential, non-public material information concerning that stock split and franchise program (including information secured at a meeting on January 13) engaged, by reason of such inside information, in a program of stock acquisition.
>
> "THIRD: That Walston failed to take action in compliance with admonitions of Amex."

Walston undertook to show in its response to the report that the three charges were "totally unsupported by the evidence" and were "incorrect". The charges have never been adjudicated, but were disposed of by an agreement between Walston and Amex.

and justified, would lend support to the defense against those claims.[15]

The Chapter X Proceedings

The Chapter X proceedings were filed with respect to America on June 26, 1970, with respect to Equity on July 22, 1970, and with respect to other Four Seasons corporations during July, August and October 1970. All were consolidated.

A plan of reorganziation of the corporations was prepared by the Trustee, which, with certain amendments, was considered at a hearing in November 1971. Thereafter the Trustee proposed a second amended plan. On March 17, 1972, the SEC filed its advisory report on the proposed second amended plan, approving the plan generally, but

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15. Charges were also filed by the Exchange against Frank J. Crimmins, a vice president of Walston, in charge of one of its New York offices. One of the charges was summarized by Crimmins in his reply as follows: (a) that "as a matter of law, a special relationship between Walston, Crimmins and * * * [America] * * * existed. From or because of this special relationship, it is alleged that Mr. Crimmins had an obligation to the customers of Walston, to the investing public and to the Exchange to avoid engaging in activities which could be construed as serving his own self-interest and the special interests of Walston" and (b) that "solicitation and concerted activities to promote interest and market activity in the stock of [America] engaged in by Mr. Crimmins, to the extent disclosed in the Report, coupled with his direct and/or indirect substantial position in [America] stock, tended to serve and enhance his own personal interest and the special interest of Walston and was in direct conflict with the obligation purportedly created by the alleged special relationship." Crimmins answered the charges, and they have never been adjudicated.

Again, it is not necessary for this court at this time to do more than state (a) that the report includes certain statements of fact, evidence, inferences and conclusions, which, if true and justified, would lend support to some of the claims made against Crimmins and other defendants by the plaintiffs in these class actions; and that the reply contains certain statements of fact, evidence, inferences and conclusions, which, if true and justified, would lend support to the defense against those claims.

suggesting a few modifications.[16] As a result of those suggestions, a Second Amended Plan of Reorganization (Restated) was filed on March 21, 1972, and Judge Bohanon entered (1) an order approving the restated plan, setting a date for hearing on confirmation of the plan and objections thereto, and providing for notice of the restated plan and of the hearing to be sent to creditors, stockholders and other interested parties, (2) an opinion and order approving the compromise and settlement of the Class G claims (defined in the plan, set out below herein), and (3) an order establishing procedures for filing Class G claims, approving forms, fixing a bar date, directing notice, etc. The hearing was held, objections were heard, and on July 17, 1972, Judge Bohanon entered an order confirming the Trustee's Restated Plan, hereinafter referred to as "the plan".

The plan provides for the transfer of all the assets of the debtors and of all partnerships and corporations in which they are the sole partners or shareholders, to a reorganized company (Anta).

Anta assumes the remaining mortgages and certain lease obligations, upon terms agreed upon with this group of creditors.[17]

Unsecured creditors of all the debtors, referred to as "Class C creditors", receive one share of Anta stock for each $7 principal amount of allowed claims.[18]

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16. Pursuant to Section 173 of Chapter X. 11 U.S.C. § 573.

17. It also assumes operating liabilities incurred during the proceedings.

18. Except that claimants holding unsecured claims aggregating $200 or less will be paid such amount in cash. No fractional shares will be issued, but will be paid in cash at the rate of 80% of the fractional interest in one share.

Holders of outstanding shares of America or Equity, and holders of warrants to buy shares of America, Equity or Franchise are not considered Class C creditors. The plan is based upon the conclusion that America and Equity are insolvent and that the warrants of Franchise are without value.

The plan provides for an offer of settlement to "Class G—Creditor Stockholders", defined as persons who (1) purchased stock or other securities of debtors (either directly from debtors or in the securities markets) on or before July 22, 1970 (the date of the filing of the Chapter X petition by Equity), and (2) filed claims, in a manner and within the time fixed by the court in the order approving the plan, for the amount of the loss suffered by them, the loss being defined as the excess of amounts paid by them for all such purchases, over the amounts realized by them from all sales of such securities. The plan set aside a number of shares of Anta stock equal to one-half of the number of shares issued to unsecured creditors, and will distribute such shares (i. e. one-third of all Anta stock) among the Class G claimants in proportion to the amount of losses claimed and allowed. The number of Anta shares to be distributed for each dollar of loss thus depends on the total amount of claims for losses filed and allowed.[19]

The Class G claimants, therefore, are generally the same persons who comprise the class or classes sought to be established in the class suits involved in M.D.L. 55. Class G claims in a total amount of approximately $110 million have been filed with the Trustee in the reorganization proceeding.

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19. The amount of shares to be distributed to any claimant may not exceed one share for each $7 of loss.

The Trustee retained for prosecution all causes of action belonging to the debtors.

The SEC noted in its March 16, 1972, report that the stock of Anta to be received by unsecured creditors under the plan had an estimated value of $21 million (which was about 80% of their claims, exclusive of post-bankruptcy interest), whereas the Class G claimants received stock of Anta having an estimated value of $10.5 million in settlement of claims against the debtors of a little over $100 million. Nevertheless, after a full discussion of the problems involved, the SEC concluded:

> "* * * All facts considered, we think that the trustee's offer of settlement is a practical proposal that under Chapter X standards the court may approve in the interest of a prompt reorganization and as fair to all persons affected by this settlement."[20]

Two appeals were taken from the order of the bankruptcy court approving the plan—one by Lowell S. Fink et al., plaintiffs in two of the class suits in M.D.L. 55, the other by Charles O. Finley. The appeal by Fink et al. is being dismissed as part of the M.D.L. 55 settlement.[21]

As noted at the beginning of this opinion, the settlement now under consideration includes not only the claims involved in the M.D.L. 55 class suits, but also the claims of

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20. The SEC added: "It should be noted that the settlement does not call for any release of the defendants other than the debtors. Claimants will remain as free as heretofore to pursue the class suits against such other defendants, but with one-third of the reorganized enterprise securely tucked away in their pockets."

21. The parties to the settlement agreed to proceed despite the refusal of Finley to dismiss his appeal, but made this settlement null and void if its approval by this court in M.D.L. 55 or by the judge in the Chapter X proceeding is vacated or reversed in whole or in part on appeal.

the Chapter X Trustee against many of the same defendants. After the hearing on November 16-17, 1972, in M.D.L. 55, this court stated that it would approve and confirm the settlement, and on November 21, 1972, after a hearing in the Chapter X proceeding, Judge Eubanks confirmed the settlement of the Trustee's claims.

M.D.L. 55

Ten actions—seven of which claimed to have been brought on behalf of all purchasers of stock of America or Equity or both who suffered a loss—were brought in or transferred to this district and assigned to me by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407 on May 21, 1971.[22] Nine additional cases have been similarly transferred.

Each action named a different set of defendants, but Clark, Bouse, Gray, Andrews, McCollum, Walston & Co., Inc., Montgomery Company and Arthur Andersen & Co. have been named as defendants in most of the cases which seek to be treated as class actions. Altogether 40 individuals, partnerships and corporations have been named as defendants in one or more actions, not counting the efforts to establish several defendant classes, which would add hundreds of additional defendants.

In one or more of the complaints claims were asserted against some or all of the defendants under §§ 5, 11, 12 and 17(a) of the Securities Act of 1933, under §§ 9, 10(b) and 20 of the Securities and Exchange Act of 1934, and under

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22. In re Four Seasons Securities Laws Litigation, 328 F.Supp. 221 (Jud.Pan.Mult.Lit.1971).

Rule 10(b) (5) of the SEC.[23] One or more included a common law claim and derivative claims. The derivative claims were dropped after the Trustee in the Chapter X proceedings filed actions against various defendants.

A first pretrial order,[24] dated May 28, 1971, provided for the practice and procedure in the consolidated cases, stayed discovery proceedings until further order of the court, tolled certain time requirements, including the time for filing responsive pleadings, and called for a preliminary pretrial conference on July 20, 1971.

At the July 1971 conference, counsel for the respective parties stated their positions. It was the general consensus and the court ordered that all discovery or other pretrial proceedings should be stayed until further order of the court, except specified document discovery and interrogatories. The next pretrial conference was scheduled for November 18, 1971. The permitted discovery was conducted.

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23. The claims may be summarized as follows: that—

(a) In connection with the sale of securities or commercial paper of America, Franchise, Overseas, Equity, FSN, and related or affiliated companies, the defendants employed devices, schemes, and artifices to defraud and engaged in acts, transactions or a course of business which operated as a fraud or deceit upon the purchasers of such securities or commercial paper;

(b) registration statements, prospectuses, financial statements, and other material published and made available to stockholders and the public contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, with respect to America, Francise, Overseas, Equity, FSN, and related or affiliated companies; and

(c) certain of the defendants engaged in a conspiracy to defraud investors with respect to America, Franchise, Overseas, Equity, FSN and related or affiliated companies.

24. Generally similar to Sample Pretrial Order No. 1, Manual for Complex and Multidistrict Litigation, pp. 161, 162.

At the November 1971 conference, counsel for Sher had different ideas from counsel for Fink et al. and counsel for Fetman et al. as to the desirable method of procedure. Counsel for Sher wished to proceed rapidly to trial on the theory of a single conspiracy *ab initio*; counsel for Fink wished to press separate claims or causes of action under various sections of the 1933 and 1934 acts, including claims for market manipulation, which would complicate and delay the progress of the cases, but might result in holding a larger number of defendants. Counsel for the several plaintiffs and defendants differed sharply in their views with respect to the proper class or classes. It was apparent that additional discovery and briefing would be needed before this court could fairly decide what classes should be established and for what purposes. It was generally agreed that a schedule for (a) discovery on the class issue, (b) statements of position on the class issues by all counsel, (c) replies to such statements, and (d) a hearing thereon, should be established. As tight a schedule as was reasonably possible was established by court order and enforced with few exceptions.

During the next few months the court heard arguments on the discovery of certain classes of documents, and made the necessary rulings.[25]

Meanwhile, in January 1972 counsel for three plaintiffs or groups of plaintiffs seeking to represent a class or classes were given conditional leave to file amended complaints, reserving the right to all parties to object to the proposed amendments. Several plaintiffs filed such amended complaints, some adding additional defendants, further complicating the class problem. In his amended complaint, objections to which have not yet been heard,

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25. See, e. g., ruling on the production of certain documents in the possession of the SEC, D.C., 54 F.R.D. 527.

plaintiff Sher seeks to add as a defendant class all persons who were partners of Arthur Andersen & Co. at any time during the period from May 9, 1968, to May 13, 1970. There are hundreds of such persons, in many countries. The court has not ruled on the troublesome question whether a class of defendants can be sued for damages, with service only on a representative selected by the plaintiff, nor on other questions which will arise if classes of defendants are permitted.

Because claims of attorney-client privilege had been asserted, the court ordered that limited depositions of defendants Clark and Andrews[26] be taken in open court on May 1. The court believes that these depositions helped all parties appraise the settlement value of the cases.

After the depositions a further conference was held, with respect to discovery motions and related questions, the authentication of documents, the effect of the proposed reorganization plan in the Chapter X proceedings, and other matters.

Early in May Fink was conditionally allowed to file, subject to objections, a third amended complaint. Among the parties sought to be added by Fink were four of the largest broker-dealers in the country, joined on a claim of market manipulation by them and other defendants.[27] In the titling of his third amended complaint, plaintiff Fink lists among the defendants "Arthur Anderson & Co., A Co-Partnership, Marvin Hambrick and Kenneth J. Wahrman, individually and as representatives of a Class consisting of 800 or more individual partners of Arthur Anderson &

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26. Andrews had served as counsel for several individuals and entities.

27. Also sought to be added by Fink was Francis R. Santangelo, the designated American Stock Exchange specialist on America, who was sued individually and as a partner of L. D. Babcock & Co.

Co., Walston & Co., Inc., individually and as representative of a class of underwriters who participated in the public sale and distribution of common stock of Four Seasons Nursing Centers of America, Inc., pursuant to Prospectus dated May 9, 1968 and November 26, 1968, Montgomery & Co., a limited partnership, Glenn R. Miller, individually and as representative of a Class consisting of limited partners of Montgomery & Co." In the body of the complaint, however, under the heading "defendants", Fink lists and identifies Arthur Andersen & Co., Marvin Hambrick, Kenneth J. Wahrman, Walston & Co., Inc., Montgomery Company, and Glenn R. Miller, but makes no reference to any of them as representatives of a class of defendants, and although he sometimes asserts claims against "all defendants", he does not refer in any way to a class of defendants in the body of the complaint. He asserts claims under various sections of the Securities Acts, as well as Rule 10b(5), and retains his common law claims.

During May and June counsel for many of the parties filed statements of position on the class issue, pointing up the many problems involved. There was little agreement among them with respect to the proper classes.

From June 19 through June 22 a conference was held, at which the possible and proper classes and the problems raised by the proposed addition of the four broker-dealer defendants were discussed. The court ordered that another conference be held on July 17.

That conference was held on July 17-20. Counsel for Fink was allowed to drop the four large broker-dealers from his conditionally allowed third amended complaint, without prejudice.

After further argument on the class problem, as to which counsel for the various parties took widely varying positions, the court stated that it was willing to enter an

order, hammered out by court and counsel during the conference, which would, in effect, designate five actions as class actions and conditionally, preliminarily and tentatively divide the persons for whose benefit the cases purport to be brought, solely for pretrial and discovery purposes, into two classes, set out in footnote 28 in the margin, subject to the right of the court to modify or withdraw such designation and division at any time prior to decision on the merits. The proposed order included the findings required by paragraphs (a) and (b)(3) of Rule 23, F.R.Civ.P., but added the provisions set out in footnote 29 in the margin. The

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28. "(1) All persons (other than defendants named in any of said cases, including the partners of any of said defendants) who at any time from May 9, 1968, to July 22, 1970, inclusive, purchased or acquired securities issued by Four Seasons Nursing Centers of America, Inc., Four Seasons Franchise Centers, Inc., or Four Seasons Overseas, N.V., and who suffered a loss thereon or still owned any such securities after July 22, 1970;

"(2) All persons (other than defendants named in any of said cases, including the partners of any of said defendants) who at any time from November 6, 1968, to July 22, 1970, inclusive, purchased or acquired securities issued by Four Seasons Equity Corporation, and who suffered a loss thereon or still owned any such securities after July 22, 1970."

29. "This Court reserves and defers a determination of the specific cases, claims or questions of law or fact which qualify for class action treatment under Rule 23 for purposes other than discovery.

"This order is entered without prejudice to the rights of the parties to renew or otherwise assert, in connection with any reformulation of class definitions, the creation of new classes or of subclasses, the finalization of classes for purposes of trial or otherwise, any and all objections, claims or contentions they may have with respect to the issues of class definition and class representation in these proceedings. This order is also entered without any determination of, and with full reservation to the parties of the right to press or resist all applications, motions or objections hereafter filed or presently pending, including, inter alia, those relating to: (a) whether as to any claim, complaint or cause of action a valid claim is stated; (b) whether any valid defense of the Statute of Limitations is available; (c) whether any complaint may be amended or new parties added to pending complaints; (d) whether any class of defendants may be approved for class action treatment pursuant to Rule 23; (e) whether any approval for class action treatment pursuant to Rule 23 may be approved or authorized as respects recently named new defendants, including Frank Crimmins, Francis R. Santangelo, and L. D. Babcock & Co."

proposed order also contained provisions for notice to all members of the classes, advising them of their right to opt out and other necessary matters. See Rule 23(c)(2).

All counsel present then advised the court that they were engaged in very serious settlement negotiations, and asked the court to hold up the entry of the proposed order for a brief period, to permit them to continue their negotiations. They convinced the court that, in view of all the circumstances of this case, it would be fairer to the thousands of members of the potential classes, as well as the parties presently represented by counsel in the cases before the court, to let them know the terms of a proposed settlement before requiring them to decide whether or not to opt out.[30]

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30. Wright and Miller, in their Federal Practice and Procedure: Civil, § 1786, at p. 145, state:

"Rule 23(c)(2) does not specify when the required notice should be given. Generally, however, it should be sent as soon as the court determines that a class action is proper under subdivision (c)(1) so as to provide the absentees with a full and meaningful opportunity to intervene to protect their rights or to opt-out. Although the timing of the notice has little or no practical effect on the class members' ability to exclude themselves from the action, inasmuch as that is preserved until the date specified in the notice, the right to enter the action may be substantially impaired if the absent parties are not notified of the suit's existence until shortly before a judgment is entered.

"In some cases the court may decide to postpone giving formal notice under Rules 23(c)(2) if there is reason for the delay and it would not prejudice those class members who are not before the court. * * *"

In this case the court has never felt that it was or is possible, without considerable additional discovery and argument on many issues, to determine what, *if any*, class or classes may properly be established for a trial or trials. The parties were in general agreement that the cases had not yet reached a point where defendants should be required to file their answers or other responsive pleadings, because it was felt that arguments on questions raised by pleadings at this stage of discovery would be premature. The discovery which has heretofore been conducted was for a limited purpose, and could properly be conducted without establishing classes. The further discovery—principally depositions

(Continued on following page)

The Settlement

During most of the next two months counsel for the several parties engaged in long and difficult settlement negotiations, which finally resulted in an agreement, which was embodied in an order, notice and accompanying documents. The order, conditionally approving the proposed settlement for submission to the members of the classes established by the order for the purpose of effectuating the proposed settlement, and the notice attached to the order as an exhibit, were signed by the court on September 21, 1972, after a hearing. The classes so established by the order were:

1. All persons (other than the Four Seasons companies, the Trustee thereto, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970, still owned any such securities or commercial paper;

2. All persons (with the same exceptions) who at any time from November 6, 1968, to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970, still owned any such securities or commercial paper.

Footnote Continued—

of many witnesses, which would be taken were it not for the settlement—would require the establishment of tentative classes for limited purposes. The court was prepared in July 1972 to establish such tentative classes and to notify potential class members of that action. However, since a settlement was imminent, it would have been unfair to the class members to require them to decide whether or not to opt out without telling them about the proposed settlement.

The court found and determined that for the purpose of effectuating the proposed settlement, the pre-requisites set out in Rule 23(a) and (b)(3) were met with respect to each of the two classes established by the order.

James R. Tolbert, III, the Trustee of America, Franchise, Overseas, Equity, and FSN, was authorized and directed to mail, on or before October 2, 1972, notice and proof of claim forms[31] to each member of the classes whose identity and address was known to him or whose name was furnished to him by any of the parties, at such member's last known address, and to cause the notice to be published once, on or before October 6, 1972, in the national edition of The Wall Street Journal.

Pursuant to Rule 23(c)(2), F.R.Civ.P., the court found that the notice to be given to members of the classes as directed by the order was the best notice practicable under the circumstances, that adequate provision had been made for individual notice to all members of the classes who could be identified through reasonable effort, and that such notice met all requirements of Rule 23.

The settlement may be summarized as follows:

(a) For purposes of effectuating the settlement, the Fetman, Fink (2 cases), Ginsberg and Sher actions shall be maintained by the plaintiffs therein as class actions on behalf of the classes listed above.

(b) The settlement includes all claims which have been or could be asserted by or on behalf of the classes, or any member thereof, arising out of or relating to any act or omission relating to the Four Seasons companies, and other related or affiliated companies, or relating to the business,

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31. In substantially the same form as Exhibits C, D-1 and D-2 to the order.

management or financial statements of any of the Four Seasons companies, or transactions in the securities or commercial paper of any of the Four Seasons companies, prior to the date of entry of the final judgment provided for in the order, whether or not asserted in the class actions.[32]

(c) The settlement of the class actions is made in conjunction with and contingent upon the settlement of four plenary actions instituted in this court by the Trustee in the Chapter X proceedings.

(d) In settlement of the class actions and the Trustee actions, certain of the defendants or persons on their behalf have severally agreed, subject to the terms and conditions of the order, to contribute various amounts towards the settlement aggregating $8.5 million in cash (the Settlement Fund) and to release or procure the release of certain claims aggregating in excess of $1 million heretofore filed against the debtor estates in the Chapter X proceedings. Walston has also agreed to release and discharge such outstanding debt balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston, but only so far and to the extent that such debt exists by reason of the purchase by such customer, from or through Walston, of securities of America or Equity.[33] Of the $8.5 million, the amount of $7 million (the Class Settlement Fund) is to be paid in settlement of the class actions, and $1.5 million is to be paid to the trustee, together with the release of the claims

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32. The order and notice then summarized the claims which have been asserted in the class actions. See footnote 23.

33. On September 21, 1972, this amount was believed to be about $385,000. The court is now advised that it will probably be about $500,000.

against the debtor estates referred to above, in settlement of the trustee actions.[34]

(e) The Plan of Distribution of the Class Settlement Fund, set out in the notice, contemplates that:

"(a) Distributions will be made to claimants whose claims are allowed by the Court, in the proportion that the allowed claim bears to the aggregate of all allowed claims.

"(b) Any Class 'G' claim heretofore filed in the reorganization proceedings by any member of the classes may, if the claimant so elects, be incorporated by reference in these proceedings;

"(c) Each claimant will be required to offset, against his losses on purchases from May 9, 1968 through July 22, 1970 of securities or commercial paper of America, Franchise, Overseas, Equity and FSN, any profits realized thereon;

"(d) Any Class C creditor in the reorganization proceedings whose claim is based upon debentures, notes or other debt-type securities of America, Franchise, Overseas, Equity, or FSN shall be deemed to have received a dividend on his claim equal to 90% of the face amount of such debt securities by virtue of the provisions in the Plan of Reorganization for distribution of stock of the reorganized companies;

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34. The Trustee advised the court that the proposed settlement will materially expedite the termination of the Chapter X proceedings and will enhance the value of shares of the reorganized company to be distributed pursuant to the plan of reorganization heretofore approved by the court in the Chapter X proceedings.

"(e) All equity securities heretofore issued by America, Franchise, Overseas, Equity or FSN shall be deemed to have no value; and

"(f) No claim for interest shall be allowed."

The claim of the Class G creditors in the Chapter X proceeding had also required netting.

The notice contains the requirement that proof of claim forms be filed by January 3, 1973.

(6) Upon final approval of the settlement, the judgment to be entered in M.D.L. 55 will:

(1) Dismiss without costs, with prejudice and on the merits: each and all of these class actions and all settled claims as to all members of the classes who have not duly and timely requested exclusion therefrom; all other actions in M.D.L. 55 brought by consenting plaintiffs and by any other plaintiff who is a member of either of the classes and has not duly and timely requested exclusion therefrom (opted out); and the derivative causes of action in all M.D.L. 55 cases;

(2) Require each member of the classes who claims a right to participate in the Class Settlement Fund to execute and deliver, as part of his proof of claim, a release in the form contained in exhibits to the order;

(3) Bar forever the prosecution against the defendants or anyone else of any and all settled claims by any member of the classes, except by those who have opted out;

(4) Bar all members of the classes who opt out from instituting, maintaining or participating in any class action against anyone which asserts or relates to any or all of the settled claims. (This provision does not prevent those

who opt out from maintaining individual actions asserting their claims against anyone, including the defendants who are contributing to the settlement.);

(5) Provide that plaintiffs' attorneys of record in these class actions shall not in any proceeding or litigation represent any person who asserts against any defendant herein or anyone else any claim arising out of or relating to the subject matter of any of the settled claims; and

(6) Provide that the Court shall have and retain jurisdiction to allow attorneys' fees and disbursements to plaintiffs in the class actions and their counsel, and to deal with matters relating to the class settlement and plan of distribution.

The order and the notice also (1) set a date and method by which members of the classes who desired to be excluded therefrom in these class actions might opt out; and (2) set a date and place for a hearing (a) to determine whether the proposed settlement and the plan of distribution are fair, reasonable, equitable and adequate, and should be confirmed, (b) to pass on applications for fees and allowances in connection with the settlement, and (c) to take other action contemplated by the order.[35]

The Trustee duly mailed the notice and proof of claim forms (16,199 in all) to each member of the classes whose identity and address was known to him or whose name was furnished to him by any of the parties, and furnished on request 12,000 additional copies to various persons, firms and corporations, including securities brokers, and caused

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35. The order also contained certain conditions (which are no longer important), housekeeping provisions, and provisions with respect to the rights and obligations of the defendants inter se.

said notice to be duly published in The Wall Street Journal.[36]

On or before November 9, 1972, approximately 2,539 proofs of claim had been received by the Trustee, representing claims (which have not yet been processed) aggregating approximately $22,565,264.

The Trustee mailed forms for requesting exclusion from the classes to each person who asked for them.

Twelve written requests for exclusion from the classes[37] were filed with the Clerk on or before November 1, 1972. Such persons appear to have aggregate potential claims of approximately $500,000, and have effectively exercised their right to be excluded from the classes. No other requests for exclusion from the classes had been filed with the Clerk through November 15, 1972, except one ambiguous set of papers filed by counsel for the Bank of America, as trustee of a trust, which will be considered by the court at a later date.

All conditions of the proposed settlement set forth in the order were met or waived except matters to be performed after final judgment herein.

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36. At the request of various defendants in the class actions who are also defendants in certain other actions relating to transactions in the securities or commercial paper of the Four Seasons companies, the Trustee timely served by registered mail a copy of the order and its exhibits, including the notice annexed thereto, upon all named plaintiffs or third party plaintiffs in the seventeen transferred, tag along, or related actions. The Trustee forwarded all inquiries from members of the classes and others to counsel designated by the court for reply.

37. Most of which were substantially in the form attached to the order but some of which were in the form of letters and telegrams.

Hearing on Confirmation of Settlement

On November 16 and 17, 1972, the hearing called for by the order and notice was held. No persons appeared at the hearing and objected to the proposed settlement except Edward I. Cohen, Esq., representing himself and seven other persons claiming to be members of one or both of the classes, none of whom has requested exclusion from the classes, and who appear to have aggregate claims, computed in accordance with the order, of approximately $300,000. No other member of either of the classes objected to the proposed settlement at or prior to the hearing, either orally or in writing; but one man, who was a selling shareholder in the November 1968 public offering of America and who has filed no claim in the Chapter X proceedings, objected to the proposed settlement without stating any reason for his objection.

At the hearing the evidence offered in support of the proposed settlement included, inter alia, the entire court file and record in this M.D.L. 55 proceeding,[38] and, in addition, a copy of the Second Amended Plan of Reorganization (Restated), the Advisory Report of the SEC on Proposed Plan of Reorganization, a copy of the order in the Chapter X proceedings confirming the Second Amended Plan of Reorganization (Restated), and the order and opinion of the court in the Chapter X proceedings approving the compromise of the Class G claims.

The court admitted all evidence offered and not withdrawn voluntarily by counsel for objectors, including a

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38. Encompassing the transcripts of pretrial hearings, testimony, documentary exhibits, answers to interrogatories, pleadings, statemnets of positions, and briefs.

report of investigation by the American Stock Exchange (Amex).[39]

The court also admitted, at the request of proponents and without objection, separate replies by Walston & Co., Inc., and Frank Crimmins to the Amex report, and a verified "response" filed by counsel for Sher and Ginsberg, for the purpose of correcting certain alleged "errors and misconceptions" in the memorandum filed by Cohen.

Counsel for the trustee in the Chapter X proceedings stated to the court (a) that the trustee supported and recommended approval of the proposed settlement, and (b) that the SEC had advised him that it would appear at the November 21, 1972, hearing in the Chapter X proceedings on the Joint Application for Authority to Compromise Controversy and that it would announce that it had no objection to the proposed settlement.

Counsel for Fetman, for Fink, for Sher, for Andersen, for Clark and for Walston had submitted memoranda in support of the settlement; Cohen had submitted a memorandum in opposition; and one or more reply memoranda had been filed. All had been read by the court before the hearing. All counsel who wished to argue orally were heard.[40]

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39. In his brief, Cohen referred to certain facts which he had learned and which he assumed had not been considered by counsel for the plaintiffs in the class suits. He was mistaken in his assumption.

40. Cohen urged, inter alia, that the court require the defendants who are contributing to the settlement to state and make public the amount each of them is contributing. At the hearing on September 21, 1972, the court was told by counsel and was convinced that secrecy with respect to the amounts the several defendants had agreed to contribute was a sine qua non of the settlement. Assuming that such disclosure may ordinarily be required, the court is satisfied that it should not be required in this case, for reasons which should not be set out while individual actions against various defendants are still pending.

Counsel for plaintiffs who had submitted fee applications were heard and were questioned at length by the court.

Subsequent Proceedings

On October 31, 1972, the trustee had filed in the Chapter X proceedings the "Joint Application for Authority to Compromise Controversy". On November 21, 1972, after I had stated on November 17 that I would confirm the settlement, Judge Eubanks confirmed the settlement of the trustee's claims by an order entered in the Chapter X proceedings, after a hearing at which no objection was made to the confirmation of the settlement.

A final judgment, confirming the settlement of the class actions in M.D.L. 55, was signed on November 30, 1972, and entered on December 4, 1972.

Reasons for Approval and Confirmation of Settlement

In *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2 Cir. 1971), the Court set out the legal standards to be considered in determining whether a settlement should be approved, by quoting Judge Wyatt's statement in the court below, as follows:

> "Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.
>
> "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the

amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and to 'form an educated estimate of the complexity expense, and likely duration of such litigation * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise'. The Supreme Court then emphasizes: 'Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.' The quotations are from Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. [414,] 415, 424-425, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) [[D.C.,] 314 F.Supp. [710,] at 740-741]." 440 F.2d at 1085.

The Amount of the Settlement. As we have seen, the settlement provides the following benefits for class members, before fees: (a) $7 million in cash; (b) $500,000 (being one-third of the $1.5 million received by the Trustee in the settlement[41]); (c) the value to members of the classes of the reduction in the amount of the claims of those persons who benefit by Walston's agreement not to attempt to collect some $500,000 of balances due Walston from class members (since the total claims will probably exceed $100 million, this will represent a reduction in claims of about

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41. At the hearing, the Trustee refused to commit himself as to whether the $1,500,000 would be distributed promptly as a dividend on the Anta stock, one-third of which will presumably be held by the same persons who are members of one of the classes for whose benefit the M.D.L. 55 class actions have been brought. In the November 21, 1972, order in the Chapter X proceedings, the court directed that this be done.

one-half of 1%, and will benefit other class members to that small extent); and (d) the release of about $1 million of claims against the debtor estates, which will benefit class members as holders of one-third of Anta stock to the extent of about $350,000.

These items add up to about $8 million, which is a large sum of money. The total settlement has been said without contradiction to be one of the largest ever paid in a securities case. On the other hand, $8 million dollars is less than 8% of the Class G claims filed in the Chapter X proceedings, and therefore of the presumed amount which will be proved by class members herein.

The Class G claimants will also receive (assuming the approval of the reorganization plan in the Chapter X proceedings is affirmed on appeal) one-third of the stock of Anta, estimated to be worth $10 million, and the Trustee has testified that in his opinion a prompt settlement of the Trustee's claims will benefit Anta in various ways (outlined at the hearing) and should therefore benefit the class members.[42] For example, the loss carryover, estimated at $23 million, which Anta will enjoy for a time, would provide a dowry for the prospective "bride" in a possible early merger, benefiting the class members who, as Class G claimants in the Chapter X proceedings, will receive shares of Anta stock.

Likelihood of Plaintiffs' Success. There is little doubt but that plaintiffs would be able to prove a prima facie case against many of the defendants under one or more of their theories. On the other hand, many of the defendants have

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42. The prompt receipt (1) of cash by class members who file their claims herein and (2) of stock by those who have filed Class G claims in the Chapter X proceedings is of some value, albeit difficult to estimate.

possible defenses.[43] The probability of plaintiffs recovering the full amount of their claims is doubtful.[44] Moreover, unless plaintiffs can hold the accountants liable, it appears that they cannot collect anywhere near the full amount of their

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43. E. g., counsel for Clark notes that in denying the $4 million claim of the State of Ohio in the Chapter X proceedings, Judge Bohanon found that "no misrepresentations were made to the State of Ohio, or others", and that his decision was affirmed on appeal. State of Ohio v. Four Seasons Nursing Centers of America, Inc., 465 F.2d 25 (10 Cir. 1972). Counsel for Clark argues that the quoted finding "necessarily encompasses a judgment that in providing its financial statements for the six months ended December 31, 1969, to the State of Ohio, America did not misrepresent its financial condition at that period", and that, "because those financial statements were premised on the independence of Equity and showed substantial receivables due to America from Equity, Judge Bohanon's finding also indicates that America did not misrepresent Equity's independence". Even though the decision on appeal may be read more narrowly than counsel for Clark reads it, there is force in the argument that the finders of fact in the M.D.L. 55 cases may not find all necessary facts in favor of plaintiffs on many of their claims.

44. Harry A. Young, Jr., Esq., attorney for Fetman, et al., whom the court designated as liaison counsel for plaintiffs in connection with the settlement, stated his belief that plaintiffs would ultimately prevail on the merits, but candidly summarized the difficulties facing plaintiffs as follows:

> "Certain of the defendants have raised questions which are substantial in nature * * * [including] * * * statutes of limitations, measure of damages, class definitions, and that these consolidated cases are not susceptible to class action treatment * * *. There also would be at a later point in time questions of individual reliance (if reliance still is an issue) and individual damage suffered by the many thousands of class members, the proof of which * * * would be lengthy and difficult.
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> "* * * the issues of accounting and market manipulation raised in the pleadings present numerous and complex issues and problems. * * *
>
> "All of the foregoing present substantial problems in trying these consolidated cases to a jury. It is very possible that if there were split trials in these consolidated actions, the trial on the issue of liability alone to a jury might take many, many months and subsequent trials or hearings on individual damages before a jury, special master, or a judge might literally consume years in view of the many thousands of potential claimants. There also are questions * * * as to

(Continued on following page)

claims.[45] The accountants have several defenses to the various charges, particularly to the only one which can be expeditiously handled, i. e. the claim based upon the single conspiracy theory.[46]

Footnote Continued—

whether any portion of any claimed loss might be attributable to general market conditions during the period preceding the Four Seasons reorganization proceedings, whether any portion of any loss suffered by the claimants is attributable to stocks of nursing homes in general losing favor with the public, and what percentage of any loss was attributable to the wrongful activities of the defendants in light of such other issues. All of the foregoing accounting and damage questions would require the opinion of numerous experts, whose opinions would undoubtedly conflict. * * *"

All of the defenses referred to by Young have been raised by defendants, who argue: that no general conspiracy has been established by the discovery to date, or, in fact, existed; that Equity was not a sham; that the stock of America was one of the "high flyers" on Amex, and that the price of 184 times reported earnings reached in 1969 was produced largely by the speculative fever which pervaded the market at that time, as shown by the fact that several nursing home stocks sold at an even higher price-earnings ratio. Defendants argue that the complex questions of fact and law (including reliance, causation, scienter, limitations, and complicated problems of proof and admissibility of evidence against the numerous defendants, absent the establishment of a conspiracy among them) would make recovery against defendants highly unlikely and result in an unmanageable proceeding. They also argue that even if liability were established, the ascertainment of the appropriate amount of damages recoverable by the possible classes and subclasses from the several defendants would further complicate and delay the ultimate disposition of the claims. See Feit v. Leasco Data Processing Equipment Corp., 332 F.Supp. 544, 586 (E.D.N.Y.1971). Cf. Esplin v. Hirschi, 402 F.2d 94, 104-105 (10 Cir. 1968), and the opinions in Chasins v. Smith Barney & Co., 438 F.2d 1167, 1169, 1174 (2 Cir. 1970-1971).

45. Objectors suggested that additional defendants be added, basing their suggestion on the assumption that they had unearthed additional facts. Substantially all of those facts were already known to counsel for Fetman, Fink, Sher and Ginsberg, who had decided that the suggested defendants should not be added; one was already a party.

46. Counsel for plaintiffs have espoused the theory that a conspiracy was entered into between defendants Clark, Bouse, Gray, some officers of Walston and some partners of Montgomery

(Continued on following page)

[1] *Classes and Subclasses.* Plaintiffs' other theories and claims would almost certainly require a considerable number of classes or subclasses. There are involved in this case the securities of America, Equity, FSN and Overseas, some of which were sold in the America private placement, some in the first America public offering, some in the second America public offering, some in the Equity private placement, some in the Equity public offering, and some in the after-markets following all of these offerings.[47] One or more of the possible classes could not be represented by any of the plaintiffs in the five class actions.[48] The issue of limitations is not the same for the several claims, and the availability of that defense in some of the situations presented is not clear. The issue of reliance is still very much up in the air with respect to several of the claims asserted. See *Affiliated Ute Citizens of Utah et al. v.*

Footnote Continued—

to raise and keep up the market price of America stock so that they could unload their holdings at a substantial profit. Such a theory makes sense, whether or not it could be proved. But when the conspiracy theory is expanded to include Andersen and other defendants, it becomes less plausible, more difficult to prove, and likely to split into several claimed conspiracies.

47. Andersen argues that there must be separate classes based upon the six audit reports it certified, because a person who bought stock before a later report was made public cannot say that he relied on the later report.

48. Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); Thaxton v. Vaughan, 321 F.2d 474 (4 Cir. 1963). This rule applies to actions arising under the Securities Acts. Greenstein v. Paul, 275 F.Supp. 604 (S.D.N.Y.1967), aff'd 400 F.2d 580 (2 Cir. 1968); Baseh v. Talley Industries, Inc., 53 F.R.D. 9 (S.D.N.Y.1971); Sanders v. Merrill Lynch, Pierce, Fenner & Smith, Inc., CCH Fed.Sec.L.Rptr. ¶ 93,226 at 91,409 (S.D.NY.1970); Puharich v. Borders Electronics Co., Inc., CCH Fed.Sec.L.Rptr. ¶ 92,160 at 96,728 (S.D.N.Y.1968); Cordova v. Bache & Co., 321 F.Supp. 600, 604 (S.D.N.Y.1970); Bluestein v. Friedman, CCH Fed.Sec.L.Rptr. ¶ 92,588 at 98,543-98,544 (S.D.N.Y.1970); DiJulio v. Digicon, 339 F.Supp. 1284, 1292-1293 (D.Md.1972). See generally Rule 23, F.R.Civ.P., and Advisory Committee Note, 39 F.R.D. 69, 99-100 (1966); 3B Moore's Federal Practice ¶ 23.04 (1969).

United States, et al., 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). That issue could hopelessly fragment the proposed class or classes.[49]

Likely Duration of Litigation. The shortest realistic estimate of the time within which the cases can be brought to trial is one year, provided the ultimate decision with respect to classes permits one or two trials on one or a few relatively simple theories of liability against individuals, partnerships and corporations. If that is not possible, by reason of the prosecution of various claims on various theories against various defendants or classes of defendants, with attendant rulings in this court and possible appeals, the time within which any of the cases can be brought to trial would probably be at least doubled. In either event there would probably be many cross-claims and third-party claims, which would be likely to extend the time even fur-

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49. Objectors suggested that the court should create a subclass of persons who purchased stock before it reached its zenith but failed to sell until later because of alleged misstatements or misrepresentations by defendants, despite the fact that such persons realized a profit and not a loss on the transactions in question. It is true that those facts would not make such persons a member of either class covered by the settlement agreement; but it would not be proper to create such a class in these cases. See DiJulio v. Digicon, 339 F.Supp. 1284, 1292 (D.Md.1972), where the court quoted the following statement from Marino v. Coburn Corp. of America, CCH Fed.Sec.L.Rptr. ¶ 92,959 (E.D.N.Y.1971) (Dooling, D.J.):

> "Yet if there is such a definable group of non-selling stockholders, it is all but impossible to envisage them as damaged in their investor interest by the fact of non-disclosure as distinguished from being damaged by reason of the fact that—whenever and however disclosed—the company had a heavy loss to shoulder in the immediate future. There is no indication that a press release which told everything that management knew and anticipated would not have at once brought about an adjustment of market price to a level at which existing stockholders would register the maximum loss in market value that could flow from such a disclosure."

Moreover, it is hard to see how such plaintiffs could constitute a manageable class, since the material facts with respect to each of them would be likely to differ.

ther. In view of the complexity and novelty of some of the points, there would probably be appeals from one or more final judgments, further extending the time when members of the class might expect to collect anything. Because of the nature of the claims against the several defendants and the probability of cross-claims and third-party claims, most defendants would need separate counsel. The cost of defense would be very substantial, and would affect the ability of some defendants to pay whatever judgments might eventually be recovered against them.

[2] *Expense of Continuing Litigation.* None of the plaintiffs in the class suits appears eager to finance the cost of continuing litigation, although at least two of them are well able to do so. None of them has objected to the settlement; all of them wish to accept it.[50] The objectors indicated that they did not wish to finance the further prosecution of the cases.[51] No one volunteered.

Recommendation by Counsel. It has been stated that a court should not substitute its judgment for that of the parties who worked out the settlement, in the absence of fraud, collusion or bad faith, or of evidence that the settlement, taken as a whole, is so unfair as to preclude judicial approval. See *Newman v. Stein*, 464 F.2d 689, 691-692 (2 Cir. 1972); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647 (7 Cir. 1971); *Glicken v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y.1964); *Zerkle v. Cleve-*

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50. None of them has paid anything toward the expenses incurred during the last two years by their counsel, in amounts of $31,022, $28,361.61 and $16,134 for the three separate groups.

51. They suggested that the Trustee in the Chapter X proceeding should do so. No order in this proceeding could require this action. The objectors did not make the suggestion in the Chapter X proceeding, where the Trustee, the creditors, the SEC and the court were satisfied with the settlement.

land-Cliffs Iron Company, 52 F.R.D. 151, 159 (S.D.N.Y. 1971).

[3] In *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308, 316 (S.D.N.Y.1972), Judge Bonsal stated that the court should give great weight to the fact that the lawyers for substantially all the plaintiffs and defendants who had been engaged in that arduous litigation for seven years unanimously supported the settlement. Here, the lawyers for the class plaintiffs have been engaged in this litigation for two and a half years, and all of the lawyers who have been actively engaged in the litigation support the settlement. The court must also consider, however, whether there was any fraud or collusion in arriving at the compromise.

No one suggests that there was any fraud or collusion in the ordinary sense. However, Cohen, for himself and the other objectors, states in his memorandum:

> "The Court is also requested to make an inquiry into the extent that the settlment reached was truly the result of adversary proceedings in which the protection of the interests of the Class G claimants was the primary concern of the attorneys representing that class. This statement is not meant to impeach the integrity of those lawyers who represented the class up to now. Rather, it is meant to suggest that, for one reason or another, perhaps, with respect to the settlement, their interests were not identical to those of the class."[52]

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52. Cohen's memorandum continued: "Out of a gross cash settlement to the class of $7,000,000 these lawyers have claimed $2,500,000 as fees and expenses. It is true that $7,000,000 is an objectively large sum, but it is a very small sum when compared to the estimated damages of $110,000,000. In this respect, it is difficult to see how the lawyers could have gotten significantly

(Continued on following page)

At oral argument, after he had heard from all attorneys for plaintiffs and defendants, Cohen softened his criticism. But whether or not the point is raised by any of the parties, the court should consider it in such a case as this, and has considered it in the light of everything which has been brought to the attention of the court from May 1971 to date and of all the points discussed herein.

The court concludes that the implied charge that counsel for Fetman, Fink and Sher did not act in the best interests of their clients and the classes in negotiating the settlement is not supported by the facts.

Failure of Other Members of Classes to Object. Not only the lawyers for the plaintiffs in the five class actions have approved the settlement, but the overwhelming majority of the members of the classes have in effect approved it, because (a) only twelve persons (or couples), having claims amounting to about one-half of 1% have opted out, (b) only seven persons (or couples) having claims of about one-third of 1% have objected, whereas (c) 2,539 proofs of claim totalling over $22 million had been filed herein as of

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Footnote Continued—

more money if the class had actually been completely compensated. It is true that the time and expense of further litigation would have raised the amount of their expenses, as well as the amount that constituted a 'reasonable fee'. However, the self-interest of the lawyers was certainly better served by an immediate settlement followed by an immediate payment than it would have been by insisting to a higher settlement which might not be agreed to. The latter course would only serve to delay the payment of an amount no bigger than that to which they now apparently feel entitled."

The court has not yet approved any fees for counsel, but will do so in a separate opinion, promptly after considering all evidence submitted and all memoranda, filed and to be filed, on the subject.

November 9, 1972, only about one month after the notice, with about two months remaining for filing claims.[53]

Manageability. The various theories, claims and contentions now advanced by plaintiffs will probably cause fragmentation of the proposed class or classes of plaintiffs for any purpose except discovery, and make these cases very difficult, if not impossible, to manage.

The pleadings and the further discovery which would be required if the settlement were not approved would be likely to increase the problems.[54]

The case has proved to be a Hydra, for when one problem is disposed of, two are likely to arise in its place, and the solution of cauterizing the wounds by settlement becomes desirable from the standpoint of the court system, as well as of all parties, if the proposed settlement is fair.

Conclusion

[4] The proposed settlement is fair, reasonable, equitable, adequate, and in the best interests of the classes.

The plan of distribution, including the administrative provisions thereof, is fair, reasonable, equitable, and in the best interests of the classes.

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53. These figures are even more impressive when it is considered that seventeen investment companies and other corporations, having claims running from $1 million to $14.6 million, a total of over $53 million, about half of the total claims, have neither opted out nor objected to the settlement.

54. The case bristles with potential cross-claims and third-party claims. For example, Clark contends that he relied on the advice of Walston, Andersen and various prestigious law firms not now parties, and Walston, Andersen and other defendants contend that they relied on statements of Clark. If the court should, after further discovery, allow amendments to the complaints which would bring in other broker-dealers, the problems discussed would be compounded, and the number of classes for any purpose except discovery would almost surely become unmanageable.

As noted above, the court has already entered a judgment, signed on November 30, 1972, and entered on December 4, 1972, approving and confirming the proposed settlement and the plan of distribution and overruling the objections thereto.

AMENDMENT V

TO THE

CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULE 23

OF THE

FEDERAL RULES OF CIVIL PROCEDURE

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims

or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

RULE 60

OF THE

FEDERAL RULES OF CIVIL PROCEDURE

RELIEF FROM JUDGMENT OR ORDER

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one

year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

SUPREME COURT, U. S.

NOV 4 1974

MICHAEL RODAK, JR., C

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-379

STATE OF OHIO

Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER MONTGOMERY CO., and WALSTON & CO., INC.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals has not been published. A copy of that opinion appears at p. A1 of the Appendix to the petition for a writ of certiorari. The opinion of the district court is reported at 59 F.R.D. 667, and is also set forth at p. A22 of the Appendix to the petition. The supplemental opinion

of the district court is unreported, and appears at p. A52 of the Appendix to the petition.

QUESTION PRESENTED

The question which would be presented for review if a writ of certiorari were granted would be whether, where a federal court has

> (1) designated a class under Rule 23 of the Federal Rules of Civil Procedure pursuant to subdivisions (a) and (b)(3) of the Rule; and
>
> (2) issued notice to the class which not only fulfills the requirements of subdivision (c)(2) of the Rule but also informs of the terms of an impending class action settlement and judgment,

a class member who receives the notice and does not request exclusion or take any other action in response to the notice can, after approval of the settlement and entry of judgment under subdivision (c)(3) of the Rule, seek relief from the judgment on the ground that such class member was not adequately represented.

STATEMENT OF THE CASE

Beginning in June of 1970, a series

of class and individual civil actions were instituted in various federal district courts throughout the country alleging numerous violations of the federal securities laws in connection with transactions in the securities of Four Seasons Nursing Centers of America, Inc. ("Four Seasons") and Four Seasons Equity Corporation ("Equity") in the period from May of 1968 to mid-1970. Among the defendants were members of the boards of directors and management of both Four Seasons and Equity, the principal underwriter for two public offerings of Four Seasons stock and one public offering of Equity stock, the companies' auditors, and others. Among those sought to be represented by plaintiffs in the class actions were all persons who had in the foregoing period purchased securities of Four Seasons or Equity and suffered a loss thereon.

By certain decisions and orders of the Judicial Panel on Multidistrict Litigation, the first of which issued in May of 1971, most of these actions, including all the class actions, were transferred to the Western District of Oklahoma and assigned to Senior District Judge Robert C. Thomsen for coordinated or consolidated proceedings pursuant to 28 U.S.C. § 1407.*

During the sixteen months following

*The Panel's initial transfer decision is reported at 328 F. Supp. 221.

the initial transfer, discovery and other pretrial proceedings were conducted under the supervision of the transferee judge. These included extensive briefing and argument, at hearings held in the summer of 1972, on the issue of class determination. At the conclusion of these hearings, the transferee judge advised counsel that he would permit the litigation to proceed under Rule 23 on behalf of all those sought to be represented, divided into two classes: one consisting of all those who had purchased securities of Four Seasons (or various related companies), and the other of all those who had purchased securities of Equity. Counsel for the parties then advised the transferee judge that negotiations looking toward a class settlement were in progress and requested leave to pursue the negotiations, which was granted.

On September 21, 1972 the district judge signed an order (the "Order") which designated five of the pending actions as class actions maintained under Rule 23(b)(3) on behalf of the two classes and tentatively approved, for submission to the class members, a proposed monetary settlement.*

*The basic content of the Order, the background of the litigation, and the main events leading to the eventual approval of the settlement and entry of judgment pursuant thereto, are described in the district court's opinion approving the settlement, reported at 58 F.R.D. 19.

The Order approved and directed pursuant to Rule 23(c)(2) the issuance, by both individual mail and publication, of a notice to class members. The notice was mailed and published in accordance with the Order.

The Order provided and the notice advised, among other things, that any class member could be excluded from such class by filing on or before November 1, 1972 a written request for exclusion; that any class member who did not file such a request would be bound by any judgment entered in connection with the settlement proceedings; that any class member could enter an appearance in the proceedings; that a hearing respecting the proposed settlement (described in the notice) would be held on November 16, 1972; and that any person affected by the Order had a right to be heard at the hearing.

The State of Ohio, a class member, received individual notice by certified mail. It did not seek exclusion within the specified period or make any other response to the notice.

On November 30, 1972, pursuant to the Order and following approval of the settlement, the district judge signed a final class judgment. The judgment, which was entered in the Western District of Oklahoma on December 4, 1972 and not appealed from, bars all class members who did not request exclusion from prosecuting any of the claims defined in the Order as being settled. It thus bars

Ohio from asserting claims arising from its transactions in Four Seasons securities.

On December 21, 1972, Ohio filed a motion in the same proceedings to be relieved from the final judgment under subdivisions (1), (4) and (6) of Rule 60(b) of the Federal Rules of Civil Procedure. The district court granted the motion under Rule 60(b)(6). The Court of Appeals for the Tenth Circuit reversed and directed reinstatement of the judgment against Ohio.*

SUMMARY OF ARGUMENT

A writ of certiorari should not be granted since the decision below does not conflict with any federal decision respecting the effect of notice in a Rule 23(b)(3) class action and merely applies the principle of law embodied in Rule 23 that a class member in such an action who receives actual notice is bound by the judgment if he fails to seek exclusion within the time period specified in the notice. That rule is essential to insure the finality of class action judgments rendered after notice.

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*The opinions are referred to at pp. 1-2, infra.

ARGUMENT

I

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS ON THE SAME MATTER

The case of Hansberry v. Lee, 311 U.S. 32 (1940), cited by petitioner, did not involve a class action where, as here, notice to the class was given. In Hansberry, the Court had no occasion to decide, and did not address, the question whether a class member who receives notice and an opportunity to be heard is thereby accorded due process of law.

The same is true with respect to Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). As noted by the decision below, Gonzales involved a class action maintained under Rule 23(b)(2), in which notice was neither given nor required to be given.

Nor did this Court's recent decision in Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974) address the issue which would be presented in this case. The Court's statement in Eisen of what the Rule requires in order for a class action to be maintained obviously did not speak to the right of a class member who has received and ignored the notice to contend, after entry of the judgment, that adequacy of representation was not had. Indeed, petitioner's brief does not argue that the decision below was in conflict with Eisen.

Moreover, federal decisions have consistently enforced class judgments as to those class members who received notice. See Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (7th Cir. 1971); Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970); Supermarkets General Corp. v. Grinnell Corp., 59 F.R.D. 512 (S.D.N.Y. 1973), aff'd 490 F.2d 1183 (2d Cir. 1974); Mungin v. Florida East Coast R.R., 318 F. Supp. 720 (M.D. Fla. 1970), aff'd 441 F.2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971).

Accordingly, the considerations set forth in Rule 19(b) of this Court respecting conflict in decisional law are not applicable to the instant case.

II

THE DECISION BELOW APPLIES A PRINCIPLE OF LAW EMBODIED IN RULE 23 AND ESSENTIAL TO THE FINALITY OF CLASS ACTION JUDGMENTS, AND THERE IS THEREFORE NO SPECIAL OR IMPORTANT REASON FOR REVIEW OF THE DECISION

Rule 23(c)(3) provides that a judgment entered in a class action under subdivision (b)(3) of the Rule shall include those to whom the notice given under subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. That provision is relied upon by both the federal judiciary and

parties to class actions in the federal courts as a basis for assuming that class action judgments will bind all those who have received notice pursuant to the Rule. The decision below, in holding that one who has received actual notice is bound by the judgment, confirms that assumption. It rejects an attempt by a single class member who has failed to respond to a class notice to avoid the judgment on the ground of a plethora of allegedly special circumstances, found by the court below to have been insufficient to demonstrate a denial of due process in view of the notice. Given the necessity for assuring finality in class judgments, we submit simply that no special or important reason for review of the decision is present.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: November 6, 1974

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-379

STATE OF OHIO,
Petitioner,

VERSUS

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

BRIEF OF ARTHUR ANDERSEN & CO. IN OPPOSITION TO PETITION OF STATE OF OHIO FOR A WRIT OF CERTIORARI

WILLIAM G. PAUL
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November, 1974

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-379

STATE OF OHIO,
Petitioner,

VERSUS

ARTHUR ANDERSEN & Co., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY Co., and WALSTON & Co., INC.,

Respondents.

BRIEF OF ARTHUR ANDERSEN & CO. IN OPPOSITION TO PETITION OF STATE OF OHIO FOR A WRIT OF CERTIORARI

Respondent Arthur Andersen & Co. respectfully prays that this Court deny the State of Ohio's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") entered in this proceeding on August 13, 1974.

QUESTIONS PRESENTED

1. Whether the Tenth Circuit properly denied the State of Ohio ("Ohio") relief from the final judgment approving settlement of class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure pursuant to Ohio's motion under Rule 60(b) of such Rules when the Tenth Circuit found that—

(A) Ohio received the notice and order delineating the settlement and informing Ohio that—

(a) Ohio was a designated member of the class;

(b) Ohio had the opportunity to—

(i) opt out; or

(ii) be represented by counsel; and

(c) Ohio would be bound if it failed to opt out;

(B) Ohio stood by and did nothing until after final judgment was entered confirming the settlement, when it filed its motion under Rule 60(b) of the Federal Rules of Civil Procedure to be relieved from the operation of the final judgment; and

(C) Where due process is thus satisfied, adequacy of representation *need not be shown* as a matter of constitutional necessity (Emphasis added. Ohio App. A19); and that such conclusion was not in conflict with—

(a) *Hansberry* v. *Lee*, 311 U.S. 32 (1940); or

(b) *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974); or

(c) *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973).

2. Whether Ohio has shown special and important reasons which would warrant this Court's exercise of its power to grant certiorari?

SUPPLEMENTAL STATEMENT OF CASE

On September 21, 1972, the trial court signed an order in the class actions for the purpose of settlement which, among other things, defined the classes (one of which included Ohio), made the findings required by Rule 23(b)(3) of the Federal Rules of Civil Procedure (including a finding that the representative parties in these class actions would fairly and adequately protect the interests of such classes), approved the form of notice and directed the giving of such notice to the classes, permitted the class actions to be maintained as class actions, tentatively approved the proposed settlement, provided that members of the classes who desired to be excluded from the classes must elect to be excluded no later than November 1, 1972, and that each member who fails to timely request exclusion would be bound by any judgment or order, whether favorable or not, in connection with the settlement, and set a hearing on whether the proposed settlement should be finally approved to be held on November 16, 1972 (Andersen App. A1).

The notice (Andersen App. A28) was duly published and mailed with copies of said order and accompanying papers. In fact two copies of the order, notice and accompanying papers were mailed to Ohio, one addressed to the State of Ohio, c/o Attorney General, and the other to William Brown, Attorney General. The return receipts indicate that both mailings were delivered to the Attorney General of Ohio, one on October 6, 1972, and one on October 10, 1972 (Ohio App. 35).

The notice and order delineated the terms of the proposed settlement and informed Ohio that it was a desig-

nated member of the class, that it had the opportunity to opt out or be represented by counsel, and that it would be bound if it failed to opt out (Ohio App. A19).

No election to opt out was filed by Ohio (Ohio App. A10). The Final Judgment approving the settlement and barring prosecution of all settled claims against the M.D.L. 55 class action defendants or anyone else was entered on December 4, 1972, which, among other things, confirmed and made absolute, unconditional and final all of the findings and determinations made in the order of September 21, 1972 (Andersen App. A39).

Ohio took no appeal from the judgment, but on January 2, 1973, more than eighty-five days after receiving copies of the class action notice and order, Ohio filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure requesting relief from the operation of the Final Judgment (Ohio App. A10-11). The trial court granted relief, and the Tenth Circuit reversed.

REASONS FOR DENYING WRIT

I. The Decision by the Tenth Circuit Is Not in Conflict With the Decisions of This Court and the Decision of Another Circuit Relied on by Ohio.

A. Decision by Tenth Circuit

In analyzing the trial court's opinion, the Tenth Circuit determined that the trial court had granted Ohio relief from judgment because the trial court believed that under all the circumstances Ohio had been denied due process (Ohio App. A15-16). Upon its application of the due process tests to the total factual situation involved in this case, the

Tenth Circuit found that Ohio was accorded due process. The Tenth Circuit attached particular significance to the fact that Ohio was on notice as to the particular terms of the impending judgment and had a unique opportunity to judge for itself, retrospectively, whether Ohio's interests had been adequately represented at a time when Ohio was capable of excluding itself if not satisfied.

A close review of the relevant facts demonstrates the correctness of the Tenth Circuit's determination.

Since the settlement had already been negotiated and tentatively approved pursuant to Rule 23(c) of the Federal Rules of Civil Procedure prior to the time Ohio received notice, there was as a practical matter nothing further for the class representatives or their counsel to do except to perform the ministerial duties involved in effectuating the settlement such as processing claims and attending to minor details. Their responsibilities did not include any further effort to establish the merit of their asserted claims. Ohio could have accepted the settlement, or appeared by counsel of its own choosing and opposed the proposed settlement, or appeared by its own counsel and sought to have the settlement modified, or rejected the proposed settlement by opting out within the time prescribed and proceeded with its own independent litigation. It simply stood by and did nothing! The trial court held this to be inexcusable neglect (Ohio App. A40-43; F.R.D. 678-79). The Tenth Circuit agreed with that conclusion (Ohio App. A16).

The Tenth Circuit stated that in such a case "where due process is thus satisfied, adequacy of representation *need not be shown* as a matter of constitutional necessity." (Emphasis added. Ohio App. A19.)

B. *Hansberry* v. *Lee*, 311 U.S. 32 (1940)

Hansberry is not inconsistent with the Tenth Circuit decision. The state court decree which was denied *res judicata* effect and subjected to collateral attack in *Hansberry* was not entered as a class action under Rule 23 of the Federal Rules of Civil Procedure; it was a class suit in a state equity court, where no notice was required or given and no opportunity was afforded plaintiff to intervene or otherwise appear and be heard. In these circumstances, the Court felt impelled to—

> "examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such *notice and opportunity to be heard* as are requisite to the due process which the Constitution prescribes." (Emphasis added. 311 U.S. at 40.)

Since no notice had been given plaintiff of the state equity court proceeding, the Court turned to an examination of adequacy of representation, the only other element present which might have made the state equity court decree binding on plaintiff, and concluded that the interests of the plaintiff and the class representatives in the state equity suit were antagonistic, and that the "procedure and course of litigation" did not satisfy constitutional requirements.

In the instant case, notice to Ohio and the other class members was required and given, which fully informed Ohio of the terms of the settlement; Ohio could have opted out and not been bound by the judgment, or it could have appeared by counsel of its own choosing and availed itself of this opportunity to be heard. Instead, it did nothing until after final judgment. Such procedure and course of

litigation amply satisfied the requirements of due process as enunciated by this Court at 311 U.S. page 40 and quoted above.

In applying the normal "totality of the circumstances" due process test to this case, the Tenth Circuit found that Ohio was not entitled to relief under *Hansberry* and its progeny, and distinguished them as follows:

> "For we consider here an action in which Ohio not only received notice of its inclusion within the designated class, with a concomitant right to opt out, but one in which Ohio was also apprised of the very terms of the impending judgment. It was thus presented with the unique opportunity of judging, retrospectively, whether its interests *had been* adequately represented at a time when it was capable of excluding itself if not satisfied." (Ohio App. A18).

The holding of the Tenth Circuit is not novel and has well-reasoned scholarly support. B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 379-80 (1967); and F. Maraist & T. Sharp, *Federal Procedure's Trouble Marriage: Due Process and the Class Action*, 49 TEX. L. REV. 1, 9, 22-24 (1970).

C. *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974)

Ohio relies on a *statement* in *Eisen* to create an asserted conflict of decisions,[1] but, in its own petition admits that the question presented here is not the same question presented in *Eisen* (Ohio Pet. 14).

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[1] At page 14 of its Petition, Ohio quotes the following language from *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 (1974):

> "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided."

As the Tenth Circuit noted:

> "The decision [in *Eisen*], however, preceded any judgment and concerned the question of whether the action could be maintained, and is thus . . . factually distinguishable from this controversy. Moreover, the Court speaks to the requirements of the *rule*, and not the Constitution." (Ohio App. A18 n. 11).

D. *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973)

In relying on *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973), Ohio has gone to great lengths in an attempt to demonstrate a conflict of decisions among the circuits. That attempt must fail, because *Gonzales* is readily distinguishable. As the Tenth Circuit noted:

> "In the *Gonzales* case, heavily relied on by Ohio, the Court took pains to point out that the action was maintained under 23(b)(2) and not 23(b)(3) with its special notice requirements and opt-out provisions. 'As a result of these distinctions class members in (b)(1) and (b)(2) actions must necessarily rely on the representative to protect their interest.' 474 F.2d at 74 n. 12." (Ohio App. A17 n. 9).

There is no conflict with *Gonzales*. Unlike the instant case which involves a class action under Rule 23(b)(3) which requires notice and the right to opt out or be represented by counsel of the class member's own choosing, Rule 23(b)(2), under which *Gonzales* was maintained, contains no such provisions and is similar to the procedure involved in *Hansberry*.

II. The Questions Presented Are Not Sufficiently Important to Justify This Court's Exercise of Its Power to Grant Certiorari.

While the *granting* of relief from a final judgment pursuant to Rule 60(b) in a class action suit after a settlement has been consummated in reliance upon the finality of such judgment might warrant the attention of this Court since it would discourage settlements of class actions[2] and tend to vitiate the 1966 revisions in Rule 23 of the Federal Rules of Civil Procedure designed to eliminate "one-way intervention" (Ohio App. A19-A20), the denial of such relief tends to encourage settlements (which the law favors) and the adverse determination binds only the person seeking the relief.

We submit that no special or important reasons have been shown or exist for this Court to concern itself in this case.

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[2] The First Circuit recently stated in an appeal involving a derivative action:

> "[W]here the party claiming the benefit of the rule [Rule 60(b), Fed. R. Civ. P.] is one member of a large class who received notice, an indulgent construction of the rule might unduly protract settlement proceedings. This suggests that 60(b) relief should rarely be given to any member of the class whose failure to appear at a hearing is due to mistake bordering on carelessness, or carelessness itself." *Greenspun* v. *Bogan*, 492 F.2d 375, 382 (1st Cir. 1974).

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to enter its Order denying the petition for a writ of certiorari.

Respectfully submitted,

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November, 1974

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SUPREME COURT, U. S.

FILED

NOV 5 1974

MICHAEL RODAK, JR.

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-379

STATE OF OHIO,
Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

APPENDIX TO BRIEF OF ARTHUR ANDERSEN & CO. IN OPPOSITION TO PETITION OF STATE OF OHIO FOR A WRIT OF CERTIORARI

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NOTE

The items printed in the Appendix have been reproduced from the appendix in the proceedings before the United States Court of Appeals for the Tenth Circuit. The bracketed numbers indicate the page numbers in the record on appeal before the Tenth Circuit.

APPENDIX

ORDER DEFINING CLASSES, TENTATIVELY APPROVING SETTLEMENT, ETC.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION
(M. D. L. DOCKET NO. 55)

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ORDER

The Court has been advised that all plaintiffs in Civil Actions Nos. 70-375, 71-349, 71-354, 71-582, and 71-353 (hereinafter "these class actions") and all other plaintiffs in M.D.L. Docket No. 55 now represented by counsel of record for plaintiffs in these class actions, acting by their counsel, and those defendants therein who have by their counsel executed and filed the Certificate of Consent annexed hereto as Exhibit G[1], have agreed, subject to Court approval following notice and hearing, to settle upon the terms and conditions herein set forth these class actions and all claims which have been or could be asserted by or on behalf of the classes as defined in paragraph 5 hereof (the "classes") or any member thereof, arising out of or relating to certain companies herein collectively referred to as "the Four Seasons companies," *viz:* Four Seasons Nurs-

[1] Such plaintiffs are hereinafter referred to as "consenting plaintiffs." Such defendants are hereinafter referred to as "consenting defendants." Such plaintiffs and defendants collectively are hereinafter referred to as "consenting parties."

ing Centers of America, Inc. ("America"), Four Seasons Franchise Centers, Inc. ("Franchise"), Four

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Seasons Overseas, N.V. ("Overseas"), Four Seasons Equity Corporation ("Equity"), FSN Corporation ("FSN"), Four Seasons United, Four Seasons Investors, Four Seasons Nursing Centers of the West, Inc., Four Seasons Nursing Centers of the South, Inc., and other related or affiliated companies, or relating to the business, management or financial statements of any of the Four Seasons companies, or transactions in the securities or commercial paper of any of the Four Seasons companies, prior to the date of entry of the final judgment as provided for in paragraph 11 hereof, whether asserted in these class actions or not, including but not limited to claims that defendants or any of them or any other person violated the Federal Securities Act of 1933, §§ 5, 11, 12 and 17, and the Federal Securities Exchange Act of 1934, §§ 9 and 10(b), in that:

(a) In connection with the sale of securities or commercial paper of America, Franchise, Overseas, Equity, FSN, and related or affiliated companies, the defendants employed devices, schemes, and artifices to defraud and engaged in acts, transactions or a course of business which operated as a fraud or deceit upon the purchasers of such securities or commercial paper;

(b) registration statements, prospectuses, financial statements, and other material published and made available to stockholders and the public contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, with respect to America, Franchise, Overseas, Equity, FSN, and related or affiliated companies; and

(c) certain of the defendants engaged in a conspiracy to defraud investors with respect to America,

Franchise, Overseas, Equity, FSN and related or affiliated companies.

All of the above-described claims are herein collectively referred to as the "settled claims."

The Court has further been advised that the settlement of these class actions is to be made in conjunction with and contingent upon the settlement of four plenary actions (hereinafter the "Trustee actions")

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instituted in this Court by the Trustee (hereinafter the "Trustee") in the Chapter X proceedings for reorganization of certain of the Four Seasons companies now pending in this Court (hereinafter "reorganization proceedings"), in accordance with the terms and conditions set forth in the application and proposed order annexed hereto as Exhibit A, which application and proposed order are being submitted to United States District Judge Luther Bohanon, before whom the reorganization proceedings are pending.

The Court has further been advised that in settlement of these class actions and the Trustee actions, certain of the defendants or persons on their behalf have severally agreed, subject to the terms and conditions hereof, to contribute various amounts towards the settlement aggregating $8,500,000 in cash (hereinafter the "Settlement Fund") and to release or procure the release of certain claims aggregating in excess of $1,000,000 heretofore filed against the debtor estates in the reorganization proceedings and defendant Walston & Co., Inc. ("Walston") has also agreed to release and discharge such outstanding debit balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston but only so far and to the extent that such debt exists by reason of the purchase by such customer, from or through Walston, of securities of America or Equity. Of

the $8,500,000, the amount of $7,000,000 (hereinafter the "Class Settlement Fund") is to be paid in settlement of these class actions and the amount of $1,500,000 is to be paid to the Trustee, together with the release of the claims against the debtor estates referred to above, in settlement of the Trustee actions.

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Plaintiffs' counsel in these class actions and the Trustee have advised the Court, and this Court hereby finds, that the proposed settlement[2] will materially expedite the termination of the reorganization proceedings and will enhance the value of shares of the reorganized company to be distributed to members of the classes pursuant to the Plan of Reorganization heretofore approved by the Court in the reorganization proceedings.

The parties have agreed and the Court directs that this Order and all papers related to it are not, and shall not be construed as, an admission by defendants or any of them that any of the claims asserted state a cause of action against any defendant, of the validity of any claims asserted in any of the actions or of the liability of any defendant therein or of any wrongdoing by any of them or of any violation of law by any of them, or of any deficiencies or misstatements in any of the registration statements, financial statements or other documents involved, nor are they a concession nor shall they be used as any admission of any fault or omission in any oral or written statement or document or financial report heretofore issued, filed, made, reviewed, or authorized by any defendant. Neither this Order, nor any paper related to it, nor any of the terms thereof shall be offered or received in evidence in any civil, crim-

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[2] Unless the context otherwise requires, the term "proposed settlement" as used in this Order means the overall settlement of the settled claims as proposed and defined by the terms and conditions of this Order and exhibits thereto, and includes settlement of these class actions and the Trustee actions.

inal or administrative action or proceeding as an admission of wrongdoing on the part of any defendant, or as an admission by any plaintiff that the consideration to be given hereunder represents the maximum amount which could be recovered. Defendants have denied, and they continue

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to deny, the charging averments in all of the complaints, including the averments that any plaintiff suffered any monetary damage.

Counsel for the consenting parties have requested the Court to establish classes for settlement purposes only to effectuate the proposed settlement. The Court has reviewed the terms and conditions of the proposed settlement and the Court file, including transcripts of pretrial hearings and testimony, documentary exhibits, answers to interrogatories, pleadings, statements of position, and extensive briefs therein.

The Court finds and determines that the proposed settlement and the Plan for Distribution of the Class Settlement Fund annexed hereto as Exhibit B (the "Plan of Distribution") appear, *prima facie*, and subject to the right afforded any interested party by paragraph 10 hereof and consideration of any matters which may be presented at the hearing referred to in paragraph 9 hereof, to be fair, reasonable, equitable and adequate.

For the purpose only of effectuating the proposed settlement and subject to the effectuation of the proposed settlement the Court hereby finds and determines with respect to each of the classes that:

(a) The members of such class are so numerous that joinder of all members is impracticable;

(b) There are questions of law or fact common to such class;

(c) The claims of the representative parties in these class actions are typical of the claims of such class;

(d) The representative parties in these class actions will fairly and adequately protect the interests of such class;

(e) The questions of law or fact common to the members of such class predominate over any questions affecting only individual members of such class;

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(f) A class action is superior to other available methods for the fair and efficient adjudication of the controversy;

(g) The notice to be given members of such class pursuant to this Order is the best notice practicable under the circumstances, adequate provision has been made herein for individual notice to all members of such class who can be identified through reasonable effort, and such notice meets all requirements of Rule 23, F.R.Civ.P., and the Constitution of the United States.

NOW, THEREFORE, IT IS HEREBY ORDERED for purposes only of effectuating the proposed settlement and subject to further order of this Court, that:

1. The proposed settlement and Plan of Distribution are conditionally approved for submission to members of the classes.

2. These class actions shall be maintained as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure and the named plaintiffs in these class actions are hereby designated to represent the classes.

3. No other action now pending or hereafter assigned to this Court under M.D.L. Docket No. 55 shall be maintained as a class action.

4. Except as provided hereby or by further Order of this Court, for good cause shown, all persons other than the representative parties in these class actions are hereby enjoined, during the pendency of these settlement proceedings, from filing or prosecuting purported class actions against any person whomsoever with respect to any of the settled claims on behalf of either of the classes or any purported class actions on behalf of any portion thereof.

5. The classes are defined as follows:

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(a) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;

(b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper.

6. The notice to members of the classes annexed hereto as Exhibit C and the Proof of Claim forms annexed hereto as Exhibits D-1 and D-2 are hereby authorized and approved. James R. Tolbert, III, the duly appointed, acting and qualified Trustee of America, Franchise, Overseas,

Equity, and FSN, having agreed thereto, is hereby authorized and directed to mail, on or before October 2, 1972, notice and Proof of Claim forms (in substantially the same form as Exhibits C, D-1 and D-2) to each member of the classes whose identity and address is known to him or whose name is furnished to him by any of the parties, at such member's last known address, and to cause notice (in substantially the same form as Exhibit C) to be published one time, on or before October 6, 1972, in the national edition of The Wall Street Journal. Proof of such mailing and publication, in accordance herewith, shall be filed in this Court as soon as practicable.

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7. The sum of $25,000 shall be forthwith advanced to the Trustee by the consenting defendants in proportion to the cash contributions to be made by them or on their behalf to the Settlement Fund. Such sums shall be consolidated in a single check payable to the Trustee in order to preserve the confidentiality of the several contributions. The sums so advanced shall be credited against contributions due to be made by said defendants to the Class Settlement Fund. In the event the settlement is not finally approved, any amounts so advanced and not actually used by the Trustee for the notice and claims processing contemplated hereby shall be reimbursed forthwith to the defendants, and the amounts not reimbursed may be taxed as costs upon ultimate termination of these class actions. In the event the sum advanced is not sufficient to reimburse the Trustee in full for all expenses incurred, the consenting plaintiffs shall advance to him on demand such additional amounts as may be necessary, which may be similarly taxed as costs.

8. Members of the classes who desire to be excluded therefrom in these class actions must, no later than November 1, 1972, file with the Clerk of this Court a written re-

quest to be excluded, which it is requested be made on a form in substantially the form annexed hereto as Exhibit E, which form is hereby approved and may be obtained from the Trustee upon written request. Each member who fails to file a timely request to be excluded shall be bound by any judgment or order entered in these class actions, whether favorable or not, in connection with these settlement proceedings. No consenting plaintiff shall have the right to be excluded. Upon the request of any defendant in these class actions who is also a defendant in any other action or actions

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relating to transactions in the securities of any of the Four Seasons companies, the Trustee is authorized and directed to serve by registered mail a copy of this Order and its exhibits, including the notice annexed hereto, upon all named parties to such other action or actions. All such parties who are members of either or both of the classes and do not duly and timely request exclusion therefrom shall be bound by any judgment or orders entered in these class actions in connection with these settlement proceedings.

9. A hearing shall be held before this Court in the United States Courthouse, Oklahoma City, Oklahoma, on November 16, 1972, at 10:00 A.M., unless said hearing is adjourned by order of the Court, whether pursuant to paragraph 15 hereof or otherwise, for the purpose of determining whether the proposed settlement and the Plan of Distribution are fair, reasonable, equitable, and adequate and, in the event the proposed settlement be approved, whether a final order and judgment should be entered approving said settlement and said Plan of Distribution, dismissing with prejudice all claims asserted in these class actions, passing upon applications for fees and allowances in connection with the settlement, and taking the other action contemplated by paragraph 11 hereof.

10. At the hearing referred to in paragraph 9 hereof, any person affected by this Order may appear and show cause, if any he has, why (a) the settlement of these class actions should not be approved by the Court and final judgment dismissing these class actions with prejudice should not be entered; (b) the Plan of Distribution should not be approved by the Court (approval of which Plan in the form annexed shall

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not be a condition of the proposed settlement); (c) attorneys' fees and disbursements should not be awarded, in such amount as the Court may allow, to class plaintiffs and their counsel; and (d) any other action contemplated by paragraph 11 hereof should not be taken, provided, however, that no objector to the settlement, Plan of Distribution, allowances or other actions will be heard and no papers or briefs submitted by or on behalf of any such objector will be received or considered by the Court at or in connection with such hearing unless, on or before November 1, 1972, notice of intention to appear and copies of all such papers and briefs are filed with the Clerk of this Court and are mailed to each of: Thomas W. Kelly, Esq., Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, Charles W. Boand, Esq., Wilson & McIlvaine, 135 South LaSalle Street, Chicago, Illinois 60603, and Arthur F. Mathews, Esq., Wilmer, Cutler & Pickering, 900 17th Street, N.W., Washington, D.C. 20006, counsel for certain defendants, and each of: Marvin Cherner, Esq., 516 Brown-Marx Building, Birmingham, Alabama 35203, Ira Jay Sands and Robert B. Levin, Esqs., 701 Seventh Avenue, New York, N.Y. 10036, J. Vernon Patrick, Esq., Berkowitz, Lefkovits & Patrick, 1400 City National Bank Building, Birmingham, Alabama 35203, and Harry A. Young, Jr., Esq., Neistein, Richman, Hauslinger & Young, Ltd., 33 North LaSalle Street, Chicago, Illinois 60602, counsel for the respective named plaintiffs in these class actions,

and: Robert C. Bailey, Esq., 600 Hightower Building, Oklahoma City, Oklahoma 73102.

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11. If the Court, after the hearing referred to in paragraph 9 hereof, shall finally approve the proposed settlement, a final judgment[3] of this Court will be entered in M.D.L. Docket No. 55—All Cases, which final judgment will:

(a) Dismiss without costs, with prejudice and on the merits each and all of these class actions and all settled claims as to all members of the classes who have not duly and timely requested exclusion therefrom.

(b) Dismiss without costs, with prejudice and on the merits all other actions in M.D.L. Docket No. 55 by consenting plaintiffs and by any other plaintiff who is a member of either of the classes who does not duly and timely request exclusion therefrom.

(c) Dismiss without costs, with prejudice and on the merits the derivative causes of action in all M.D.L. Docket No. 55 cases.

(d) Require each member of the classes who claims a right to participate in the Class Settlement Fund to execute and deliver, as part of his Proof of Claim, a good and sufficient release in the form contained in Exhibits D-1 and D-2 hereto, which release has been deemed sufficient by all consenting parties.

(e) Require all consenting parties to perform the acts called for by this settlement and to execute and deliver such other and further documents and papers as the Court deems advisable to effectuate and finalize the settlement.

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[3] As used in this Order, "final judgment" means a judgment entered in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

(f) Bar forever the prosecution against the defendants or anyone else of any and all settled claims by any member of the classes, except by persons who have duly and timely requested exclusion therefrom.

(g) Bar forever all members of the classes who request exclusion therefrom pursuant to paragraph 8 hereof from instituting, maintaining or participating in any class action asserting or relating to any or all of the settled claims against any person whomsoever.

(h) Provide that the consenting defendants and their counsel, except as herein expressly provided, shall have no responsibility or obligation to participate in or to perform any acts in furtherance or performance of this settlement after final judgments dismissing these class actions and the Trustee actions shall no longer be subject to appellate review.

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(i) Provide that plaintiffs' attorneys of record in these class actions shall not in any proceeding in M.D.L. Docket No. 55 or in any other proceeding or litigation represent any person (whether a party hereto, a member of either class, one who requests exclusion from the classes pursuant to paragraph 8 hereof, or anyone else) who asserts against any defendant or anyone else any claim arising out of or relating to the subject matter of any of the settled claims.

(j) Provide that the Court shall have and retain jurisdiction (1) to allow attorneys' fees and disbursements to class plaintiffs and their counsel, and (2) with respect to overall matters relating to the class settlement and Plan of Distribution, as annexed hereto or as modified by the Court, including the proof and allowance of claims and decisions of related issues of fact and law and determination of the time, mode and

amounts of all payments out of the balance of the Class Settlement Fund, aided in the event the Court deems necessary by such master or masters as may be appointed.

12. All cash contributions by or on behalf of the defendants to the Settlement Fund shall be made no later than ten (10) days after the later of the entry of the final judgment pursuant to paragraph 11 of this Order and the entry of the final judgment pursuant to the application which is annexed hereto as a part of Exhibit A. Payment shall be made by certified or cashier's checks payable in New York, Chicago or Oklahoma City funds delivered to the Escrow Agent in Oklahoma City in accordance with the Escrow Agreement attached hereto as Exhibit F. All such contributions by or on behalf of the defendants shall be made in accordance with signed commitments to contribute cash aggregating $8,500,000, filed under seal with Senior United States District Judge Roszel C. Thomsen contemporaneously with the entry of this Order.* The respective commitments to make such contributions by or on behalf of any defendant are and shall be several and not joint, and, as to the insurors of certain defendants, are conditioned upon the insurors' receipt of such releases and documents as they may reasonably require from their assureds, including persons not defendants in these class actions; moreover, the contribution to be made on behalf of the Estate of Amos D. Bouse,

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deceased, is subject to approval by the Court having juris-

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* With respect to the contribution of defendant Tom J. Gray, the executed commitment to contribute shall be filed on or before October 4, 1972.

With respect to the contribution, under Lloyd's policies numbered 80514810000, 80514820000, and 80514830000, the executed commitment shall be filed on or before October 10, 1972.

diction of the administration of the Estate. The amounts of such respective commitments shall be kept confidential except for the agreed contribution to be made by any defendant who defaults in his commitment to make payment when due hereunder. Members of the classes shall share in so much of the Class Settlement Fund as is available for distribution to the classes in the manner, to the extent and upon the terms and conditions set forth in the Plan of Distribution or as such Plan may be modified by the Court.

13. Except as herein provided, the proposed settlement and all proceedings in furtherance thereof shall be null and void in the event that the District Court declines to enter final judgments in the class actions and in the Trustee actions in accordance with the terms of this Order and Exhibit A thereto, or in the event that such final judgments or any of them are vacated or reversed, in whole or in part, by a decision of an appellate court; provided, however that the refund provisions of the Escrow Agreement, to the extent that they provide for the return of cash contributions to the participating contributors, shall be valid and performed.

14. The Trustee, any consenting defendant by his counsel of record herein, and any counsel now of record for the named plaintiffs in these class actions, shall have the right to withdraw from and terminate the proposed settlement within ten (10) days after the occurrence of any one or more of the following events:

(a) If final judgments are not entered by the District Court on or before December 31, 1972 dismissing both these class actions and Trustee actions in accordance with the terms of this proposed settlement; or

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(b) If a stipulation dismissing the appeal from the plan of reorganization in the reorganization proceed-

ings filed on behalf of Lowell S. Fink, et al., in the United States Court of Appeals for the Tenth Circuit, and conditioned upon the judgment herein provided for becoming final and non-appealable, is not filed within 30 days after the entry of this Order; or

(c) If a stipulation dismissing the appeal from the plan of reorganization in the reorganization proceedings filed on behalf of Charles O. Finley in the United States Court of Appeals for the Tenth Circuit, and conditioned upon the judgment herein provided for becoming final and non-appealable, is not filed within 30 days after the entry of this Order; or

(d) If releases or withdrawals of the claims described in Exhibit A hereto are not delivered as required thereby within 30 days after the entry of this Order; or

(e) If by October 27, 1972 the Court having jurisdiction of the administration of the Estate of Amos D. Bouse, deceased, shall not have entered an Order approving and authorizing the contribution to be made by the Estate to the Settlement Fund in accordance with the signed commitment heretofore filed wth this Court and described in paragraph 12 hereof; or

(f) If the commitment as to Lloyd's policies referred to in the footnote to paragraph 12 is not filed on or before October 10, 1972.

(g) If the commitment as to Tom J. Gray referred to in the footnote to paragraph 12 of the certificate of consent of counsel for Tom J. Gray are not filed on or before October 4, 1972.

15. Each consenting defendant, by his counsel of record herein, shall have the right to withdraw from and terminate the proposed settlement on or before November 9,

1972, if the insurance companies participating in and contributing to the Settlement Fund shall not have either received the releases and documents referred to in paragraph 12 hereof by not later than November 6, 1972 or waived their right to receipt of any not furnished by such date. In the event of such withdrawal and termination, the amounts advanced by the consenting defendants pursuant to paragraph 7 shall not be taxable as costs. Each consenting defendant, by his counsel of record herein, shall also have the right to withdraw from and terminate the proposed settlement if requests for exclusion from the c es are filed by potential members of said classes having aggregate potential claims of $4,000,000 or more. Such right must be exercised on or before November 9, 1972, provided, however, that each consenting defendant shall have the right to extend

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the time which any consenting defendant has to exercise the right to withdraw conferred hereby to and including any date on or before December 8, 1972, by filing written notice on or before November 9, 1972 with the Clerk of this Court, and mailing a copy thereof to Senior United States District Judge Roszel C. Thomsen, the Trustee's counsel, and each counsel of record in M.D.L. Docket No. 55. In the event such notice is filed, the hearing provided for in paragraph 9 hereof shall be convened, but shall be adjourned by the Court to such time and date as may be then ordered by the Court. For purposes of this paragraph 15 only, the potential claim of any member of the classes requesting exclusion shall in the absence of proof to the contrary (aided by such discovery as the Court authorizes) be deemed to be:

(a) In the case of any person who filed a claim in the reorganization proceedings, 10% of any Class C claim so filed which was based upon ownership of debt securities of America, Franchise, Overseas, Equity or

FSN, and 100% of any Class G claim so filed in such proceedings;

(b) In the case of any person who did not file a claim in the reorganization proceedings, the difference between his total acquisition cost for securities of America, Franchise, Overseas, Equity or FSN acquired during the period from May 9, 1968 to July 22, 1970, and the total amount realized by him on disposition thereof, as shown in his Request To Be Excluded From Class; and

(c) In any case where the amount of the potential claim cannot be determined as provided above, and in the absence of proof to the contrary, zero.

16. In the event cash contributions aggregating $8,475,000 are not received by the Escrow Agent within the 10 days and in the manner specified by paragraph 12 hereof, any defendant or defendants shall have the right to contribute the shortage, whether the same is a deficiency

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or a default, within 10 days thereafter. If such shortage occurs by reason of a default, the Court may impose upon the defaulter such sanctions as it may deem appropriate, including the taxation of costs of the notice to the classes and counsel fees. In the event that any such default is timely cured by another defendant or defendants, the Court may enter judgment for the defendant or defendants making good the shortage against any defaulter in the amount of the default, may grant such other relief as the Court deems appropriate, and may also impose any sanctions it deems appropriate. In the event such shortage is not timely made good, then either the Trustee, by his counsel, or any counsel now of record for the named plaintiffs in these class actions shall have the right, exercisable, however, only within the 14 days thereafter, to withdraw from and terminate the proposed settlement. In the event that

such right to withdraw and terminate is not timely exercised, then judgment against any defaulter in favor of the classes and the Trustee (in proportion to their respective interests) shall be entered forthwith for the amount of the default and the Court may grant such other relief as may be just and proper and impose such sanctions, including costs and attorney's fees, as it deems appropriate.

17. Any right to withdraw from and terminate the proposed settlement conferred by any of the preceding three paragraphs may be exercised only by filing written notice with the Clerk of this Court, and mailing a copy thereof to Senior United States District Judge Roszel C. Thomsen, the Trustee's counsel, and each counsel of record in M.D.L. Docket No. 55.

18. Subject to the provisions of paragraph 20 hereof, all consenting defendants as a part of this

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proposed settlement waive all their claims of every kind and description, if any they have, against all debtor estates in the reorganization proceedings or their Trustees or attorneys, past or present, and the resulting reorganized company and its subsidiaries and affiliates, including but not limited to claims for reimbursement, indemnification, contribution, and other litigation expenses.

19. The consenting defendants expressly reserve all rights, claims and causes of action, including cross-claims and claims for contribution and indemnity, if any, which they may have against any persons whomsoever, including any other consenting defendants (other than the debtor estates in the reorganizaton proceedings, the Trustee, their attorneys, past or present, and the resulting reorganized company and its subsidiaries and affiliates) which relate to, or arise out of or in connection with, the State of Ohio's loan of $4,000,000 to America, any act or omission with respect to such loan, the litigation relating thereto, and claims,

cross-claims and third-party claims asserted in *State of Ohio* v. *Crofters, Incorporated, et al.*, Civ-72-81 (United States District Court for the Southern District of Ohio), *Shual* v. *Crofters, Incorporated, et al.*, 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas), and *State of Ohio* v. *John D. Herbert, et al.*, 72 CV-03-792 (Franklin County, Ohio, Court of Common Pleas). Subject to the provisions of paragraph 20 hereof, and except as otherwise expressly provided in this Order and exhibits annexed hereto, all consenting defendants hereby release and discharge each and every other consenting defendant, and such other consenting defendant's partners, officers, directors, agents, attorneys and employees,

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past or present, from any and all other claims by or between or among them, of whatsoever kind or nature, and which arise out of or are related to the subject matter of the settled claims or which relate to or arise out of any transactions between any consenting defendants in any of the securities or commercial paper of any of the Four Seasons companies, whether the same might be asserted as an original claim, cross-claim, counterclaim, claim for contribution or indemnification, or otherwise.

If William Tomasello fails to exercise the right to be excluded from the classes pursuant to paragraph 8 of this Order then the consent of Frank Crimmins shall have full force and effect as the consent of any other consenting defendant. Otherwise the consent of Frank Crimmins shall have full force and effect as the consent of any other consenting defendant, except that all rights of any kind, including cross-claims and counterclaims, if any, which arise or may arise out of the claims in the action of *Tomasello* v. *Walston*, as between any and all consenting defendants shall not be released by Frank Crimmins or such consenting defendants and, in the event that Crimmins cross-claims

against Jack L. Clark, Estate of Amos D. Bouse, Deceased, or Tom J. Gray, respectively, in *Tomasello* v. *Walston*, all releases between Frank Crimmins and Jack L. Clark, Estate of Amos D. Bouse, Deceased and Frank Crimmins, or Frank Crimmins and Tom J. Gray, respectively, shall be null and void.

20. Except as herein expressly provided, if for any reason this litigation is not settled in accordance with the terms hereof, then any and all agreements, oral or written, documents, consents, and releases relating to the proposed settlement shall be null and void and of no effect, and neither such writings nor the fact of this proposal nor, except as herein expressly provided, this Order may be used in any way either in subsequent proceedings in this litigation or elsewhere.

21. The Court reserves jurisdiction to adjourn from time to time and place to place the hearing prescribed hereby, and modify the Plan of Distribution, notice and claims procedures contemplated hereby, all without further notice to members of the classes.

22. The Court, without further notice to members of the classes, may in open court, upon not less than 72 hours' notice by phone to or a waiver of notice by all consenting parties and the Trustee, and provided there be no objection from any consenting party or the Trustee made on the return date, change to another date or time any date or time fixed in this Order.

Dated: September 21, 1972.

s/ Roszel C. Thomsen
Senior United States District Judge

Filed September 27, 1972

NOTE

The following Exhibits to the foregoing Order are not reproduced here:

Exhibit A — Joint Application for Authority to Compromise Controversy and Exhibits Thereto, Dated September, 1972

Exhibit C — Class Action Notice

Exhibit D-1 — Proof of Claim Form A

Exhibit D-2 — Proof of Claim Form B

Exhibit E — Form for Requesting Exclusion from Classes

Exhibit F — Escrow Agreement

Exhibit G — Certificates of Consent

EXHIBIT B TO THE ORDER DEFINING CLASSES, TENTATIVELY APPROVING SETTLEMENT, ETC.

[834]
[Exhibit B]

PLAN FOR DISTRIBUTION OF THE CLASS SETTLEMENT FUND

Introduction

The Plan for Distribution (herein the "Plan") contains the recommendations of counsel of record for the con-

senting plaintiffs[1] with respect to distribution to members of the classes of certain moneys herein referred to as "the Residual Class Settlement Fund", *viz.*, that portion of the Class Settlement Fund, including a portion of the interest earned thereon, remaining after deduction therefrom of Court costs, the expenses of administration and distribution of the proposed settlement, and such legal fees and disbursements as may be allowed by the Court to class plaintiffs and their attorneys. The consenting parties have agreed that the Plan shall be subject to approval by the Court (after the Notice to members of the classes provided by the Order) and such modification thereof as the Court may determine (without further notice to members of the classes).

THE PLAN

Members of the classes who do not timely request exclusion shall be required to complete and file a Proof of Claim form as prescribed by the Order, on or before January 3, 1973, or shall be barred from participation in the Residual Class Settlement Fund unless the Court shall, by order, extend the time for filing said Proof of Claim. The amount of each claim shall be computed and determined in accordance with the instructions and limitations contained in the form prescribed by the Court. Such forms contemplate, for purposes of this Plan of Distribution only:

[835]

(a) The incorporation by reference, if a claimant so elects, of the Class "G" claim heretofore filed by him in the reorganization proceedings;

(b) Each claimant will be required to offset, against his losses on purchases from May 9, 1968 through July 22, 1970 of securities or commercial paper of America,

[1] Unless the context otherwise requires, all terms defined in the Order to which this Plan is an exhibit shall have the same meanings as set out therein.

Franchise, Overseas, Equity and FSN, any profits realized thereon;

(c) Any Class "C" creditor in the reorganization proceedings whose claim is based upon debentures, notes or other debt-type securities of America, Franchise, Overseas, Equity, or FSN shall be deemed to have received a dividend on his claim equal to 90% of the face amount of such debt securities by virtue of the provisions in the Plan of Reorganization for distribution of stock of the reorganized companies;

(d) All equity securities heretofore issued by America, Franchise, Overseas, Equity and FSN shall be deemed to have no value; and

(e) No claim for interest shall be allowed.

Each member of the classes who submits such a Proof of Claim is herein referred to as a "Claimant", and by filing such Proof of Claim submits to the jurisdiction of the Court and agrees to supply such information and testimony as the Court, the Trustee (charged by the Order with preliminary processing of the claims of the class members) or such other person as may hereafter be designated by the Court to process or approve claims, may require.

Following preliminary processing of claims of members of the classes by the Trustee (which may include a request for additional information and evidence, the correction of mathematical computations, and the disallowance, subject to Court order, of claims which appear on their face to be incorrect or improper), the Trustee shall, as promptly as practicable, file a report with the Clerk of this Court, Senior United States District Judge Roszel C. Thomsen, and each of the present counsel of record for the named plaintiffs in these class actions.

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Said report shall list all claims and shall contain the recommendations of the Trustee with respect to the claims

which appear due to be allowed, disallowed, or further processed.

Within thirty days thereafter, present counsel of record for the named plaintiffs in these class actions may submit their objections, if any, to claims, and their recommendations, if any, with respect to the allowance, disallowance and further processing of claims.

The Court shall have jurisdiction to allow or disallow in whole or in part any claim filed, determine any disputes with regard thereto, and approve any compromise thereof, and may appoint a special master or masters, if necessary; however, present counsel of record to the consenting plaintiffs have recommended to the Court that no such appointment be made until the recommendations of the Trustee and plaintiffs' counsel are submitted and then only if the necessity therefor appears.

The Court shall thereupon enter final judgment with respect to the allowance and disallowance of claims and the entitlement of Claimants to participate in the Residual Class Settlement Fund.

After such final judgment shall be no longer subject to appellate review, the Residual Class Settlement Fund shall be distributed to Claimants whose claims are finally approved by the Court in the proportion that each such Claimant's finally approved claim bears to the aggregate of all finally approved claims filed herein.

Notice to Persons Who Between May 9, 1968 and July 22, 1970, Inclusive, Purchased or Acquired Securities or Commercial Paper Issued by Four Seasons Nursing Centers of America, Inc., Four Seasons Franchise Centers, Inc., Four Seasons Overseas, N. V., Four Seasons Equity Corporation, or FSN Corporation

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	**M.D.L. DOCKET**
FOUR SEASONS SECURITIES LAWS	**NO. 55**
LITIGATION	**All Cases**

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and an Order of the United States District Court for the Western District of Oklahoma (the "Court") entered herein on the 21st day of September, 1972 (the "Order"),

YOU ARE HEREBY NOTIFIED:

Your rights may be affected by certain class actions hereinafter described now pending in this Court, and a proposed settlement thereof; a hearing on the proposed settlement will be held in the United States Courthouse, Oklahoma City, Oklahoma, commencing at 10:00 A.M. on the 16th day of November, 1972; the 1st day of November, 1972 is the last day for electing to be excluded from the classes in the class actions described herein; the 1st day of November, 1972 is the last day for filing of appearances and objections in the class actions to the proposed settlement and to the entry of certain orders in connection therewith; the 3rd day of January, 1973 is the bar date set by the Court for filing claims in the class actions pursuant to the proposed settlement; any such date may be extended without further notice by order of the Court; and the Court has established procedures described herein which must be followed by claimants, objectors, and persons wishing to be excluded from the classes in the class actions.

[838]

1. There are pending in this Court certain actions for damages ("the lawsuits") for alleged violations of the federal securities laws and state law in connection with purchases and sales of securities of Four Seasons Nursing Centers of America, Inc. ("America"), Four Seasons Franchise Centers, Inc. ("Franchise"), Four Seasons Overseas, N.V. ("Overseas"), Four Seasons Equity Corporation ("Equity"), and FSN Corporation ("FSN"), sometimes collectively referred to as the "Four Seasons companies." The Court has conditionally ordered for purposes effectuating the proposed settlement subject to further order of the Court, that five of those lawsuits may be maintained by the plaintiffs therein as class actions on behalf of the classes defined below, namely:

(a) All persons (other than the Four Seasons com-

panies, the Trustee thereof, the reorganized company, its subsidiaries and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from May 9, 1968 to July 22, 1970 both inclusive purchased or acquired securities or commercial paper issued by America, Franchise, or Overseas, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper;

(b) All persons (other than the Four Seasons companies, the Trustee thereof, the reorganized company, its subsidiares and affiliates, defendants named in any of these class actions, and the partners of any of said defendant partnerships) who at any time from November 6, 1968 to July 22, 1970, both inclusive, purchased or acquired securities or commercial paper issued by Equity or FSN, and who suffered a loss thereon or after July 22, 1970 still owned any such securities or commercial paper.

The five lawsuits ("the class actions") are Civil Action No. 70-375, Civil Action No. 71-349, Civil Action No. 71-354, Civil Action No. 71-582, and Civil Action No. 71-353. The defendants in one or more of the class actions include the officers, directors and auditors of America and Equity during all or part of the period concerned, the managing underwriter of two public offerings of America stock and of one public offering of Equity stock, and certain others.

[839]

Claims approximating $110,000,000 have been filed in the reorganization proceedings of the Four Seasons companies by Class G claimants, as designated in the Plan of Reorganization for those companies, by persons who may be within the classes above described.

2. The complaints and statements of position in the class actions allege, in brief summary, that defendants vio-

lated, among other laws, the Federal Securities Act of 1933, §§ 5, 11, 12 and 17, and the Federal Securities and Exchange Act of 1934, §§ 9 and 10(b), in that:

(a) In connection with the sale of securities or commercial paper of America, Franchise, Overseas, Equity, FSN, and related or affiliated companies, the defendants employed devices, schemes, and artifices to defraud and engaged in acts, transactions or a course of business which operated as a fraud or deceit upon the purchasers of such securities or commercial paper;

(b) registration statements, prospectuses, financial statements, and other material published and made available to stockholders and the public contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading, with respect to America, Franchise, Overseas, Equity, FSN and related or affiliated companies; and

(c) certain of the defendants engaged in a conspiracy to defraud investors with respect to America, Franchise, Overseas, Equity, FSN and related or affiliated companies.

3. For more information with respect to the scope and extent of the claims asserted in the class actions, it is necessary to examine the complaints, statements of position and other documents which are on file with the Court. Reference can also be made to *In Re Four Seasons Securities Laws Litigation*, 328 F. Supp. 221 (1971).

4. The defendants deny the charging averments of the various complaints and deny all wrongdoing, and further deny that members of the classes are entitled to any damages or other relief.

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THE SETTLEMENT

5. The Court has conditionally approved, for submis-

sion to members of the classes, a proposed settlement of the class actions, in conjunction with and dependent upon a settlement of four plenary actions, Civil Actions Nos. 72-449, 72-450, 72-90 and 72-210 ("the Trustee actions"), instituted by James R. Tolbert, III, Reorganization Trustee ("the Trustee"), appointed by the Bankruptcy Court in the reorganization proceedings of the Four Seasons companies (BK Nos. 70-1008, 70-1008-A, 70-1008-B, 70-1008-C, 70-1008-D, 70-1129 and 70-1129-A), all pending in this District, upon terms and conditions more fully set out in the Order, to which reference is made for a fuller statement thereof.

6. In consideration of the dismissal of the class actions and the Trustee actions, and the claims asserted therein, certain of the defendants or persons on their behalf have, among other things, severally agreed to contribute various amounts towards the settlement aggregating $8,500,000 in cash, and to release or procure the release of certain claims aggregating an amount in excess of $1,000,000 heretofore filed against the debtor estates in the reorganization proceedings.

7. In addition, Walston & Co., Inc. ("Walston") has also agreed to release and discharge such outstanding debit balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston, but only so far and to the extent that such debt exists by reason of the purchase by such customer, from or through Walston, of securities of America or Equity.

[841]

8. Of the $8,500,000 proposed Settlement Fund, the sum of $7,000,000 will be used to create a Class Settlement Fund for distribution, together with a portion of the interest thereon, to members of the classes whose claims are allowed by the Court, after deduction therefrom of Court costs, the expenses of administration and distribution of the proposed settlement, and such legal fees and disbursements

as may be allowed by the Court to class plaintiffs and their attorneys.

9. $1,500,000 of the proposed Settlement Fund, and the release of the claims against the debtor estates referred to in paragraph 6 above, are to be contributed by the defendants in settlement of the Trustee actions, and will enure to the benefit of the debtor estates, the reorganized company, and all persons receiving stock of the reorganized company pursuant to the Plan of Reorganization.

10. Plaintiffs' counsel in these class actions and the Trustee have advised the Court, and this Court has determined, that the proposed settlement, if consummated, will materially expedite the termination of the reorganization proceedings and will enhance the value of shares of the reorganized company to be distributed pursuant to the Plan of Reorganization.

11. The proposed settlement is subject to certain contingencies set forth in the Order, including, among other things, Court approvals of the settlement after notice and hearing. In the event persons requesting exclusion from the classes have potential claims aggregating $4,000,000 or more, any consenting defendant may elect to withdraw from and terminate the proposed settlement.

[842]

12. *DISTRIBUTION OF CLASS SETTLEMENT FUND*

The Court has conditionally approved, and will on November 16, 1972, hear any objections to, a proposed Plan for Distribution of the Class Settlement Fund which contemplates that:

(a) Distributions will be made to claimants whose claims are allowed by the Court, in the proportion that the allowed claim bears to the aggregate of all allowed claims;

(b) Any Class "G" claim heretofore filed in the

reorganization proceedings by any member of the classes may, if the claimant so elects, be incorporated by reference in these proceedings;

(c) Each claimant will be required to offset, against his losses on purchases from May 9, 1968 through July 22, 1970 of securities or commercial paper of America, Franchise, Overseas, Equity and FSN, any profits realized thereon;

(d) Any Class C creditor in the reorganization proceedings whose claim is based upon debentures, notes or other debt-type securities of America, Franchise, Overseas, Equity, or FSN shall be deemed to have received a dividend on his claim equal to 90% of the face amount of such debt securities by virtue of the provisions in the Plan of Reorganization for distribution of stock of the reorganized companies;

(e) All equity securities heretofore issued by America, Franchise, Overseas, Equity or FSN shall be deemed to have no value; and

(f) No claim for interest shall be allowed.

13. *FILING PROOF OF CLAIM*

Every member of either class who does not duly and timely request exclusion must complete one of the two Proof of Claim forms enclosed with the mailed notice (Form A or Form B), and should mail it to:

James R. Tolbert, III, Trustee
P. O. Box
Oklahoma City, Oklahoma 73216

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If you have not filed a proof of claim as a Class "G" claimant in the Four Seasons reorganization proceedings, you should file Proof of Claim Form B. If you have filed a proof

of claim as a Class "G" claimant in the Four Seasons reorganization proceedings then you may elect, instead of providing all of the information required by Proof of Claim Form B, to incorporate by reference in these proceedings the information contained in the proof of claim previously filed by you, by appropriately marking the box indicated for such elections on Proof of Claim Form A, or, if you prefer, you may fill out and file Proof of Claim Form B.

WARNING: The Court Order provides that the completed claim form must be received not later than January 3, 1973. Claims which are not timely filed may be disallowed, in which event the claimant will receive no distribution from the Class Settlement Fund.

14. The Court will exclude you from the class or classes in the class actions if on or prior to the 1st day of November, 1972, you file with the Clerk, United States District Court for the Western District of Oklahoma, United States Courthouse, Oklahoma City, Oklahoma 73102, a written request for exclusion from these classes. In the event you choose to be excluded, the Court requests that you do so on a form which you may obtain upon written request addressed to James R. Tolbert, III, Trustee, P.O. Box , Oklahoma City, Oklahoma 73126. If you elect to be excluded from the class or classes, you will be free to pursue on your own behalf whatever legal rights you may have, except that you may not institute or participate in a class action against any person whomsoever asserting or relating to any of the settled claims as defined in the Order. Any person requesting exclusion will not be entitled to file a claim against, or participate in any distribution from the Class Settlement Fund.

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Moreover, any individual suit hereafter instituted by a person requesting exclusion may be barred, in whole or in part, by applicable statutes of limitation.

15. The fact that you are presently a party in any action involving the securities of America, Equity, Franchise, Overseas or FSN does *not* relieve you of the obligation of requesting exclusion if you do not wish to be bound by any order or judgment or by the proposed settlement. If you are a named party in any such actions you should consult your attorney concerning this Notice.

16. If you do not request exclusion from the class or classes in the manner and within the time described above:

(a) You will be included in such class or classes and any order or judgment of the Court in the class actions, whether favorable or not, in connection with the proposed settlement proceedings will be binding upon you;

(b) You may, if you desire, enter an appearance in the class actions through counsel of your choosing, provided that such appearance is entered no later than November 1, 1972. Otherwise, the named plaintiffs in the class actions and their counsel will be deemed to represent your interests as a member of the appropriate class or classes.

17. A hearing will be held on November 16, 1972 at 10:00 A.M., United States Courthouse, Oklahoma City, Oklahoma, with respect to whether the Court shall finally approve the proposed settlement, the proposed Plan for Distribution of the Class Settlement Fund, the allowance of legal fees and disbursements to class plaintiffs' counsel, and certain other matters relating to the proposed settlement, at which time any person affected by the Order may be heard; provided, however, that no objector to the settlement will be heard and no papers or briefs submitted by or on behalf of any such objector will be received or considered by the Court at or in connection with such hearing unless, on or before November 1, 1972, notice of intention to appear and copies of all such papers and briefs are filed

with the Clerk of this Court and are served upon each of:

[845]

Thomas W. Kelly, Esq.
Breed, Abbott & Morgan
1 Chase Manhattan Plaza
New York, New York 10005

Charles W. Boand, Esq.
Wilson & McIvaine
135 South LaSalle Street
Chicago, Illinois 60603

Arthur F. Mathews, Esq.
Wilmer, Cutler & Pickering
900 17th Street, N.W.
Washington, D.C. 20006

counsel for certain defendants,

and each of:

Marvin Cherner, Esq.
516 Brown-Marx Building
Birmingham, Alabama 35203

Ira Jay Sands, Esq. and Robert B. Levin, Esq.
701 Seventh Avenue
New York, New York 10036

J. Vernon Patrick, Esq.
Berkowitz, Lefkovits & Patrick
1400 City National Bank Building
Birmingham, Alabama 35203

Harry A. Young, Jr., Esq.
Neistein, Richman, Hauslinger & Young, Ltd.
33 North LaSalle Street
Chicago, Illinois 60602

counsel for named plaintiffs in the class actions, and:

Robert C. Bailey, Esq.
600 Hightower Building
Oklahoma City, Oklahoma 73102

The Court may modify the Plan for Distribution of the Class Settlement Fund, claims procedures contemplated by the Order and this Notice, and change to another date or time or date fixed in the Order or set forth herein, without further notice to members of the classes.

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18. The complete Court file in the class actions, including transcripts of hearings and testimony, documentary exhibits, statements of position, briefs and pleadings, may be examined and copied at any time during regular office hours at the office of the Clerk of the United States District Court for the Western District of Oklahoma, United States Courthouse, Oklahoma City, Oklahoma; provided, however, that those portions of the Court files subject to protective orders may be examined only in conformity with and subject to the terms of such protective orders.

19. Any question which any person to whom this notice is addressed may have with respect thereto or with respect to the Proof of Claim form should be raised with his own attorney or his advisers, or directed to counsel for named plaintiffs in the class actions (see paragraph 17 of this Notice), and not to this Court.

Dated: September 21, 1972.

s/ Roszel C. Thomsen
t/ Roszel C. Thomsen
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: FOUR SEASONS SECURITIES LAWS LITIGATION
(M.D.L. DOCKET NO. 55)

[1094]

FINAL JUDGMENT APPROVING SETTLEMENT AND PLAN OF DISTRIBUTION AND DISMISSING CLAIMS WITH PREJUDICE

This matter came on for hearing on November 16, 1972, pursuant to the order entered herein on September 21, 1972, (hereinafter called the "Order") for the purpose of determining whether the proposed settlement as defined by the terms and conditions of the Order and the exhibits thereto should be approved finally, whether the Plan of Distribution annexed to the Order as Exhibit B should be approved finally, whether a final judgment approving the proposed settlement and Plan of Distribution should be entered as

contemplated by the Order, and whether the other actions contemplated by the Order should be taken, and for the purpose of considering applications for fees and allowances in connection with the proposed settlement.

The terms used herein, which were defined in the Order, shall have the same meaning as such terms had in the Order. The Court has reviewed the terms and conditions of the proposed settlement and the court file, including transcripts of pretrial hearings, testimony, documentary exhibits, answers to interrogatories, pleadings, statements of position, and extensive briefs filed prior to the entry of the Order (all of which are deemed by the Court to be

[1095]

material to a determination of the fairness, reasonableness, equity and adequacy of the proposed settlement and which are hereby made a part of the record of the hearing upon the proposed settlement), the objections to the proposed settlement filed by Edward I. Cohen, Esq., on behalf of himself and others, and the evidence, memoranda, briefs and arguments of counsel at this hearing, and has been fully advised in the premises.

The Court finds and determines that:

1. The consenting defendants advanced the sum of $25,000 to the Trustee in accordance with paragraph 7 of the Order, to be used by the Trustee for giving of notice and claims processing that is contemplated by the Order and this judgment. Such payment of $25,000 is to be credited against the contributions required to be made by the consenting defendants to the Class Settlement Fund.

2. James R. Tolbert, III, the duly appointed, qualified and acting Trustee of America, Franchise, Overseas, Equity and FSN, acting pursuant to and in accordance with the Order, mailed notice in substantially the same form as Ex-

hibit C to the Order and proof of claim forms in substantially the same form as Exhibits D-1 and D-2 to the Order to each member of the classes whose identity and address was known to him or whose name was furnished to him by any of the parties, at such member's last known address, on or before October 2, 1972, and caused said notice in substantially the same form as Exhibit C to the Order to be published on October 6, 1972, in the Southwestern, Eastern, Midwestern and Western editions of the *Wall Street Journal*, except that, on October 6, 1972, the notice was not published in the following states: Florida, Alabama,

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Georgia, Missouri, Kansas, Ohio, the Southern portion of Illinois and two-thirds of the State of Kentucky; and the cities of Buffalo, New York, Baltimore, Maryland, Detroit, Michigan, and Washington, D. C., and on October 9, 1972, in the Eastern and Midwestern editions of the *Wall Street Journal*. The foregoing resulted in the notice being published in all editions of the *Wall Street Journal*. The Trustee mailed in excess of 28,000 copies of the notice and claim forms to members of the classes whose identities and addresses were known to him or whose names were furnished to him by any of the parties, at their last known addresses, to securities brokers and to others. Proof of such mailing and publication was filed in this Court in accordance with the terms of the Order. The notice given as aforesaid constituted substantial compliance with the Order and satisfied in all respects requirements of law, including the Constitution of the United States and subdivisions (c) (2) and (e) of Rule 23 of the Federal Rules of Civil Procedure.

3. At the request of various defendants in the class actions who are also defendants in certain other actions relating to transactions in the securities or commercial paper of the Four Seasons companies, the Trustee timely served by registered mail a copy of the Order and its exhibits, in-

cluding the notice annexed thereto, upon all named plaintiffs in the following actions:

Mollie Nussbacher v. *J. C. Andrews, et al.*, Civil Action No. 71-351 (W.D. Okla., MDL Docket No. 55);

M. G. Development Co. v. *Kohlmeyer*, Civil Action No. 71-355 (W.D. Okla., MDL Docket No. 55);

William Tomasello v. *Walston & Co., Inc.*, Civil Action No. 71-560 (W.D. Okla., MDL Docket No. 55);

Henry L. Schoger v. *Walston & Co., Inc. et al.*, Civil Action No. 71-568 (W.D. Okla., MDL Docket No. 55);

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Bertha Moss v. *Walston & Co., Inc.*, Civil Action No. 72 C 1726 (N.D. Ill. 1972);

Alf Garnaas v. *Bache & Co, Inc.*, Civil Action No. 4-71-649 (D. Minn. 1971);

Ann G. Olson v. *Walston & Co., Inc.*, Civil Action No. 71-699 (W.D. Okla., MDL Docket No. 55);

Elmer Block v. *Walston & Co., Inc.*, Civil Action No. 72-153 (W.D. Okla., MDL Docket No. 55);

Loren Schweninger v. *Walston & Co., Inc., et al.*, Civil Action No. 72-449 (W.D. Okla., MDL Docket No. 55);

Florence P. Hamilton v. *Walston & Co., Inc., et al.*, Civil Action No. 72-765 (W. D. Okla., MDL Docket No. 55);

Seymour Goeld, et ux. v. *Walston & Co., Inc., et al.*, Civil Action No. 72-811 (W. D. Okla., MDL Docket No. 55);

Jean Sitarski v. *Walston & Co., Inc., et al.*, Civil Action No. 72-812 (W. D. Okla., MDL Docket No. 55);

Thomas M. Dowling v. *Walston & Co., Inc.*, No. 7298-1972 (New York State Supreme Court, County of Kings);

Frederick Copeland v. *Walston & Co., Inc.*, No. 72-1664 (Circuit Court of the State of Oregon, Lane County);

Vincent Micel v. *Walston & Co., Inc.*, (Commonwealth of Massachusetts, Suffolk Supreme Court, 666640, remanded to Boston Municipal Court, T-27784);

State of Ohio v. *Crofters, Inc., et al.*, CIV-72-81 (United States District Court for the Southern District of Ohio);

Shaul v. *Crofters, Inc., et al.*, 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas);

and upon third-party plaintiffs in an action entitled:

State of Ohio v. *John D. Herbert, et al.*, 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas).

4. The Trustee has preserved the responses to the notice, including all proofs of claim received to date, and has made them available to all parties and to members of the classes for inspection and copying. The Trustee forwarded all inquiries from members of the classes and others to plaintiffs' counsel for reply.

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5. January 3, 1973, is the bar date for filing claims in the class actions. On or before November 9, 1972, approximately 2,539 proofs of claim had been received by James R. Tolbert, III, Trustee, representing claims (which had not yet been processed by the Trustee) aggregating approximately $22,565,264.

6. The Trustee mailed forms for requesting exclusion from the classes in the form of Exhibit E to the Order to

each person who requested them on or prior to November 1, 1972.

7. Twelve written requests for exclusion from the classes, most of which were substantially in the form of Exhibit E to the Order and some of which were in the form of letters and telegrams, were filed by or on behalf of the persons listed in Exhibit A hereto with the Clerk of this Court on or before November 1, 1972. Such persons appear to have aggregate potential claims of approximately $500,000.00, and have effectively exercised their right to be excluded from the classes. No other requests for exclusion from the classes, either in the form of Exhibit E or otherwise, have been filed with the Clerk of the Court either on or before November 1, 1972, or at any time thereafter through November 15, 1972; however, the counsel for Bank of America, as Trustee of Transport Indemnity Company and Transport Underwriters Association Employee Profit Sharing and Retirement Plan PS-13901 (hereinafter called "Bank of America"), which filed a Class G claim of $268,877.62 in the reorganization proceedings, wrote a letter, dated November 15, 1972, which was received by the Trustee on November 17, 1972, enclosing Proof of Claim Form A containing a modified form of release and stating that the Bank of America would "consider itself excluded from the class or classes" if its Proof of Claim Form with the modified form of release was rejected.

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8. No one has withdrawn from and terminated the settlement or extended the time to exercise such right as permitted by the Order.

9. All conditions of the proposed settlement set forth in the Order have been met or have been waived except to the extent provided for in paragraph 16 of the Order and paragraphs F, G and Q of this final judgment.

10. On November 16 and 17, 1972, a hearing was held before this Court in accordance with the Order. No persons appeared at the hearing and objected to the proposed settlement other than Edward I. Cohen, Esq., representing himself, Michael D. Cohen, Concetta and Joseph Di Pietro, S. Mark Fine, Lawrence Goldwasser, Frank Riccio, and Mary Louise Sullivan, persons claiming to be members of the classes, none of whom have requested exclusion from the classes, and who appear to have aggregate claims, computed in accordance with Exhibit E to the Order, of approximately $300,000.00. No other member of either of the classes objected to the proposed settlement at or prior to the hearing, either orally or in writing, but one person who was a selling shareholder in the November 26, 1968 public offering of Four Seasons Nursing Centers of America, Inc., and who filed no claim in the reorganization proceedings, objected to the proposed settlement without stating any reason for his objection. At the hearing the evidence offered in support of the proposed settlement included the entire court file and record in these proceedings, encompassing the transcripts of pre-trial hearings, testimony, documentary exhibits, answers to interrogatories, pleadings, statements of position, and briefs; an affidavit of mailing and publication of notices by the Trustee; a copy of the Second Amended Plan of Reorganization (Restated); a copy of a "Joint Application for Authority to Compromise Controversy" in the reorganization proceedings; two stipulations regarding an appeal from the reorganization proceedings by Charles O.

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Finley, et al; the "Advisory Report of the Securities and Exchange Commission on Proposed Plan of Reorganization;" a certified copy of the order in the reorganization proceedings approving the Second Amended Plan of Reorganization (Restated); a certified copy of the order in the

reorganization proceedings confirming the Second Amended Plan of Reorganization (Restated); the order and opinion of the Court in the reorganization proceedings approving the compromise of the Class G claims; an affidavit of James R. Tolbert, III, Trustee, and supporting exhibits with respect to claims filed in these proceedings, requests for exclusion from the classes, and related matters; a letter from George Cabell, General Counsel, Walston & Co., Inc., to Ira Jay Sands, dated October 19, 1972, regarding debit balances in Walston customer accounts which are being forgiven; a letter from Donald Welsh, on behalf of A. W. Jones, A. W. Jones Associates, and Hedged Investors; a letter from Harry A. Young, Jr., Esq., regarding requests for exclusion from the classes; separate replies by Walston & Co., Inc. and Frank Crimmins to a report of investigation by the American Stock Exchange; and the Verified Response filed by J. Vernon Patrick, Jr. and Marvin Cherner, for the Purpose of Correcting Certain Errors and Misconceptions which Appear in the Memorandum filed by Objector Cohen, dated November 14, 1972, all of which were received in evidence without objection. Counsel for the Trustee represented to the Court that the Trustee supported and recommended approval of the proposed settlement and stated that the Securities and Exchange Commission had advised him that it would appear on November 21, 1972 at the hearing on the Joint Application for Authority to Compromise Controversy in the reorganization proceedings and that it would announce that it had no objection to such proposed settlement.

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The Court admitted into evidence all evidence offered and not withdrawn voluntarily by counsel for objectors, including a report of investigation by the American Stock Exchange. Counsel for objectors voluntarily withdrew an affidavit in support of his Motion to Oppose The Approval of The Proposed Settlement which had been submitted to

the Court in a sealed envelope and which was returned unopened to counsel for objectors.

11. On October 31, 1972, the Trustee filed in the reorganization proceedings a "Joint Application for Authority to Compromise Controversy" signed by the Trustee, James R. Tolbert, III, the defendants in the Trustee actions, certain other parties to the reorganization proceedings, and the named plaintiffs in these class actions and their counsel, which Joint Application was in the form of Exhibit A to the Order.

12. All of the findings and determinations made in the Order, whether conditional, *prima facie* or absolute, are confirmed and made absolute, unconditional and final.

13. For reasons stated in an opinion to be filed:

A. The proposed settlement is fair, reasonable, equitable, in the best interests of the classes, and adequate and should be approved;

B. The Plan of Distribution, including the administrative provisions thereof, is fair, reasonable, equitable, in the best interests of the classes, and adequate and should be approved; and

C. The objections to the proposed settlement and the Plan of Distribution should be overruled and disallowed.

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14. By consent of all parties, paragraph I(c) (2) of the Escrow Agreement (Exhibit F to the Order) and all references thereto are to be deleted from the Escrow Agreement to be executed and delivered in implementing the proposed settlement.

15. The proposed settlement, the Order, and this final judgment are not and shall not be construed as an admission by defendants or any of them that any of the claims

asserted state a cause of action against any defendant, of the validity of any claims asserted in any of the actions or of the liability of any defendant therein or of any wrongdoing by any of them or of any violation of law by any of them, or of any deficiencies or misstatements in any of the registration statements, financial statements or other documents involved, nor are they a concession nor shall they be used as any admission of any fault or omission in any oral or written statement or document or financial report heretofore issued, filed, made, reviewed, or authorized by any defendant. Neither the proposed settlement, the Order or this final judgment, nor any paper related to any one or more of them, nor any of the terms of any of them, shall be offered in evidence in any civil, criminal or administrative action or proceedings as an admission of wrongdoing on the part of any defendant, or as an admission by any plaintiff that the consideration to be given hereunder represents the maximum amount which could be recovered. Defendants have denied, and they continue to deny the charging averments in all of the complaints, including the averments that any plaintiff suffered any monetary damage.

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16. This Court hereby expressly determines that there is no just reason for delay in the entry of this final judgment and accordingly directs that this final judgment be entered as, and be deemed, a final judgment in accordance with Rule 54(b), of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

A. The proposed settlement is hereby finally approved and confirmed as being fair, reasonable, equitable and adequate, and the parties thereto are directed to perform all acts required by the proposed settlement in accordance with the terms of the Order and this final judgment.

B. The Plan of Distribution, including the administrative provisions thereof, is hereby approved and confirmed as being fair, reasonable, equitable and adequate.

C. The objections to the proposed settlement are overruled and disallowed.

D. Paragraph I(c)(2) of the Escrow Agreement (Exhibit F to the Order) and all references thereto are to be deleted from the Escrow Agreement to be executed and delivered in implementing the proposed settlement.

E. Counsel for the plaintiffs in the class actions, on behalf of the class members, and all consenting defendants, are directed promptly to enter into the Escrow Agreement, in the form attached to the Order as Exhibit F, as modified by paragraph D hereof, with The Liberty National Bank and Trust Company of Oklahoma City, as Escrow Agent, and all parties hereto and the Escrow Agent are directed to comply with the terms of the Escrow Agreement.

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F. The consenting defendants and the insurors, who have filed commitments to make cash contributions on behalf of certain consenting defendants, are severally directed to make the cash contributions to the Settlement Fund in accordance with their respective signed commitments to contribute cash aggregating $8,475,000, filed under seal with Senior U. S. District Judge Roszel C. Thomsen contemporaneously with the entry of the Order, with certified or cashier's checks payable in Chicago, New York City or Oklahoma City funds delivered to the Escrow Agent in Oklahoma City in accordance with the Escrow Agreement not later than 10 days after the entry of this final judgment. In the event these contributions aggregating $8,475,000 are not received by the Escrow Agent within the ten (10) days and in the manner specified herein, the provisions of paragraph 16 of the Order shall be applicable.

G. Walston is directed, promptly after this final judgment becomes nonreviewable and unappealable, to release and discharge all such outstanding debit balances as are presently due and payable and have not been heretofore actually paid to Walston in any existing customer's account of Walston but only so far and to the extent that such debt exists by reason of the purchase by such customer from or through Walston of securities of America or Equity.

H. The persons listed in Exhibit A hereto are excluded from the classes and are permanently enjoined and barred from instituting, maintaining or participating in any class action asserting or relating to any or all of the settled claims against any person whomsoever.

[1105]

I. Each and all of the class actions (Civil Actions Nos. 70-375, 71-349, 71-354, 71-582 and 71-353) and all settled claims are dismissed without costs, with prejudice and on the merits, as to all members of the classes, and each member of either or both of the classes is forever barred from the prosecution against the defendants in the class actions or anyone else of any and all settled claims.*

J. All of the actions in M.D.L. Docket No. 55, including the following, are dismissed without costs, with prejudice and on the merits as to all plaintiffs therein in each of said actions:

Matthew D. Margoles, etc. v. *Four Seasons Nursing Centers of America, Inc., et al.*, Civil Action No. 71-348;

Lowell S. Fink, etc. v. *Gordon H. McCollum, et al.*, Civil Action No. 71-349;

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* The statement that the class actions listed herein are dismissed "on the merits" does not mean that such dismissals may be pleaded by any defendant as *res judicata* or collateral estoppel in any individual action (as distinguished from a class action) now maintained or which may be maintained by any person listed on Exhibit A hereto.

Henry J. Lebens, etc. v. *Walston & Co., Inc., et al.*, Civil Action No. 71-350;

Mollie Nussbacher v. *J. C. Andrews, et al.*, Civil Action No. 71-351;

Franz L. Paul, etc. v. *Jack L. Clark, et al.*, Civil Action No. 71-352;

Lowell S. Fink, etc. v. *John W. Johnston, et al.*, Civil Action No. 71-353;

Edward Ginsberg v. *Four Seasons Nursing Centers of America, Inc., et al.*, Civil Action No. 71-354;

M. G. Development Co. v. *Kohlmeyer & Co., et al.*, Civil Action No. 71-355;

Frank Sher, etc. v. *Jack L. Clark, et al.*, Civil Action No. Civ-70-375;

Orchestra Investment Club, et al. v. *Four Seasons Nursing Centers of America, Inc.*, Civil Action No. 71-356;

Manford H. Fetman, etc. v. *Walston & Co., Inc., et al.*, Civil Action No. 71-582;

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Henry L. Schoger v. *Walston & Co., Inc., et al.*, Civil Action No. 71-568;

Ann G. Olson v. *Walston & Co., Inc.*, Civil Action No. 71-699;

Elmer Block v. *Walston & Co., Inc.*, Civil Action No. 72-153;

Seymour Goeld, et ux. v. *Walston & Co., Inc.*, Civil Action No. 72-811.

Provided, however, that any individual action maintained by any person listed on Exhibit A hereto is not hereby dismissed.

K. All of the derivative causes of action in all M.D.L. Docket No. 55 cases are dismissed without costs, with prejudice and on the merits.

L. Each member of the classes who claims a right to participate in the Class Settlement Fund shall be required to execute and deliver, as a part of his proof of claim, a good and sufficient release in the form contained in Exhibits D-1 and D-2 to the Order, and no proof of claim shall be allowed without a release in such form.

M. The class plaintiffs and their counsel and all consenting defendants shall perform the acts called for by the proposed settlement and shall execute and deliver all further documents and papers as the Court may deem advisable to effectuate and finalize the proposed settlement.

N. The consenting defendants and their counsel, except as in the Order or herein expressly provided, shall have no responsibility or obligation to participate in or perform any acts in furtherance of the performance of the

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proposed settlement after this judgment and the judgment in the reorganization proceedings, pursuant to Exhibit A to the Order, authorizing and directing dismissal of the Trustee actions are no longer subject to appellate review.

Q. The attorneys of record for plaintiffs in the class actions shall not in any proceeding in M.D.L. Docket No. 55 or in any other proceeding or litigation represent any person (whether a party hereto, a member of either class, one who requested exclusion from the classes or anyone else) who asserts against any defendant or anyone else any claim relating to or arising out of the subject matter of the settled claims.

P. Neither this judgment, nor any paper related to it, nor any of the terms thereof shall be offered or received in evidence in any civil, criminal or administrative action or proceeding as an admission of wrongdoing on the part of any defendant.

Q. Except as herein provided, the proposed settlement and all proceedings in furtherance thereof, including this judgment, shall be null and void in the event that this judgment or any judgment entered in the reorganization proceedings, pursuant to Exhibit A of the Order, authorizing and directing the dismissal of the Trustee actions is vacated or reversed in whole or in part by a decision of an appellate court; provided, however, that the refund provisions of the Escrow Agreement to the extent that they provide for the return of cash contributions to the participating contributors shall be valid and performed.

[1108]

R. Subject to the limitations set forth in paragraph N, hereof, all parties hereto and their respective counsel, the Trustee and the Escrow Agent are directed to continue to comply with the terms of the Order, this judgment, the Plan of Distribution and the Escrow Agreement insofar as the same relate to the processing of proofs of claim. As promptly as practicable after January 3, 1973, the last day for filing proofs of claim by members of the classes, the Trustee is directed to file his report with the Court as provided in the Plan of Distribution and to deliver a copy of such report and all supporting documents to each of the present counsel of record for the named plaintiffs in these class actions. Upon the filing of the report and delivery of the copy and supporting documents, the Trustee is relieved and discharged from any further responsibility under the Order, the Plan of Distribution, and this judgment. At the same time, the Trustee shall serve a final statement for expenses incurred upon the Escrow Agent and each of the

present counsel of record for the named plaintiffs in these class actions. The final statement shall be paid by the Escrow Agent within ten (10) days out of the Class Settlement Fund, unless a timely objection to such statement is filed with the Escrow Agent and with the Court, in which event the Escrow Agent shall await a further order of this Court; provided that such payment shall not be made unless the time for appeal from this final judgment and the judgment pursuant to the Joint Application for Authority to Compromise Controversy shall have expired and no appeal shall have been taken. The Escrow Agreement shall be modified to permit such payment upon satisfaction of the conditions of the preceding sentence. In the event the Escrow Agent does not pay such statement within 30 days from presentment, then and in that event consenting plaintiffs shall pay such statement to the Trustee on demand. In the event the

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proposed settlement becomes final and unappealable such sums paid to the Trustee by consenting plaintiffs shall be reimbursed to them from the Class Settlement Fund as costs without further order of this Court upon presentment by consenting plaintiffs to the Escrow Agent of their statement for such costs.

S. Harry A. Young, Jr., Esq., counsel for plaintiff Fetman, is hereby appointed plaintiffs' representative for the class in connection with all matters relating to the processing of claims. All matters relating to claims shall be referred to him and he shall coordinate such matters with counsel for other class plaintiffs in such manner as he deems appropriate. In connection therewith he shall be paid from the Class Settlement Fund on an hourly basis to be determined by further order of this Court.

T. The Court shall have and retain jurisdiction with respect to allowance of attorneys' fees and disbursements

to class plaintiffs and their counsel and with respect to all matters relating to the Class Settlement Fund and the Plan of Distribution, including the proof and allowance of claims and decisions of related issues of fact and law and determination of the time, mode and amounts of all payments out of the balance of the Class Settlement Fund, aided in the event the Court deems it necessary by such master or masters as may be appointed. The Court shall also have and retain jurisdiction to determine the effect of the letter, dated November 15, 1972, on behalf of Bank of America referred to above in paragraph 7, and what rights, if any, Bank

[1110]

of America may have as a result thereof, including whether the Bank of America should be deemed to be added to Exhibit A. The provisions of this paragraph T respecting retention of jurisdiction shall not affect the finality of this judgment as to any matters not expressly reserved in this paragraph T.

U. Since an Order on Application to Compromise Controversy substantially in the form included in Exhibit A to the Order, but modified to conform to the stipulations admitted in evidence with respect to the appeals of Charles O. Finley, et al., and in certain respects not material to the proposed settlement, was entered on November 21, 1972, in the reorganization proceedings, this final judgment shall be entered as, and be deemed, a final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure and shall be effective immediately.

Entered this 30th day of November, 1972.

s/ Roszel C. Thomsen

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t/ ROSZEL C. THOMSEN
SENIOR UNITED STATES DISTRICT JUDGE

t/ ENTERED IN JUDGMENT DOCKET ON
DEC 4 1972
s/ By: Gladys M. Jones

[1111]
[Exhibit A to Final Judgment]

The following persons have requested exclusion from the classes pursuant to the Order:

William Tomasello; Loren Schweninger; Florence P. Hamilton; Jean Sitarski; Fred A. Copeland and Louise C. Copeland; Richard L. Kaufman; Yolanda C. Baud Brown; Richard E. Dippold; Victor DeRobertis and Valda DeRobertis; Charles N. Fellnagel and Mrs. Dorothy A. Fellnagel; Jerome S. Wittenberg and Corinne B. Wittenberg; A. W. Jones and Co., A. W. Jones Associates, and Hedged Investors.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-379

STATE OF OHIO,

Petitioner,

vs.

ARTHUR ANDERSON & CO., JACK L. CLARK, GORDON H. MCCOLLUM, GLENN R. MILLER, MONTGOMERY CO., AND WALSTON & CO., INC.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Whether a member of a class created by the order of a district court pursuant to Rule 23 (b) (3), who:

(a) receives timely notice by certified mail return receipt requested of a proposed settlement judgment and the hearing scheduled thereon;

(b) fails to request exclusion from the class; and

(c) fails to appear at the scheduled hearing announced in the notice;

can later move successfully pursuant to Rule 60 (b) to be relieved from the operation of the class action settlement judgment entered pursuant to the notice?

STATEMENT

As the Tenth Circuit recognized, this case presents "a unique factual situation."* In March 1970, State of Ohio, acting pursuant to a state statute authorizing the investment of state treasury funds in private commercial enterprises,** loaned Four Seasons Nursing Centers of America, Inc. ("Four Seasons") $4 million. In return, Four Seasons issued to Ohio three unsecured "commercial paper" notes with maturities up to two years. Four Seasons entered Chapter X corporate reorganization proceedings under the Bankruptcy Act in June, 1970. The bankruptcy proceedings spawned numerous civil lawsuits (many purporting to be class actions) brought by former security holders of Four Seasons and related or affiliated companies under the federal securities laws. Most of these lawsuits were consolidated for pre-trial purposes by the United States Judicial Panel on Multidistrict Litigation and transferred to the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. § 1407.*** The transferred cases were assigned to Senior United States District Judge Roszel C. Thomsen from the District of Maryland and became known as M.D.L. 55.

Ohio first sought to recover the $4 million represented by the Four Seasons unsecured "commercial paper" notes

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* App. A-17. Throughout this Opposition citations to Ohio's Appendix to its Petition will be in the form (App. A). Citations to the Joint Appendix in the Court of Appeals which has been transmitted to this Court in lieu of the record will be in the form (J. A.). Citations to the record will be in the form (Record).

** Ohio Rev. Code § 135.14 (1967).

*** *Four Seasons Securities Laws Litigation*, 328 F. Supp. 221 (1971); 331 F. Supp. 559 (1971); 342 F. Supp. 758 (1972); 344 F. Supp. 1404 (1972); 352 F. Supp. 962 (1972); 352 F. Supp. 964 (1973); 355 F. Supp. 1405 (1973); all decided by the Judicial Panel on Multidistrict Litigation.

through a fraud-based reclamation claim in the Four Seasons Chapter X proceedings. After a full hearing on the merits, this claim was decided against Ohio. *In re Four Seasons Nursing Centers of America, Inc.*, 329 F. Supp. 647 (W.D. Okla 1971), *aff'd*, 465 F.2d 25 (10th Cir. 1972). Ohio then sued certain M.D.L. 55 defendants, including respondent Jack L. Clark (CLARK), the former President and Chairman of the Board of Directors of Four Seasons, in the United States District Court for the Southern District of Ohio alleging that the unsecured "commercial paper" notes purchased by Ohio were securities under the federal securities laws, that such securities had been sold to Ohio on the basis of financial statements which were false and misleading, and that Ohio "was a person, or *belonged to a class of persons*, which defendants knew or had reason to believe would be influenced by such false and misleading statements." Complaint in *State of Ohio* v. *Crofters, Inc.*, Civil Action No. 72-81, ¶¶ 3, 20, 21, 23, 55.* (J. A., I, 416, 418-19, 430-31). [Emphasis added.]

In a separate action Ohio also sued former State officers and their surety bonding companies alleging that such former State officers had improperly and fraudulently performed their duties in authorizing the loans to Four Seasons, during their terms of office. Specifically, Ohio alleged that the loans to Four Seasons and other unrelated companies were made with "willful or gross and reckless disregard for the safety of public funds by John D. Herbert," former Treasurer of the State of Ohio, and "willfully, in-

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* The complaint alleged violations of Section 17 (a) of the Securities Act of 1933, 15 U.S.C. § 77 *q* (a), and Sections 10 (b) and 15 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78 *j* (b) and *o*, (all of which were relied upon by plaintiffs in the class actions), as well as certain provisions of the Ohio blue sky laws and common law fraud standards. Ohio also sued CLARK and others in State court seeking injunctive relief with respect to the same transactions. *Shaul* v. *Crofters, Inc.*, 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas).

tentionally, and with full knowledge of their illegality and risk of loss" by Robert F. Gardner, the Deputy Treasurer. Complaint in *State of Ohio* v. *Herbert*, 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas). (R., I, 384). The defendants in the latter action filed third party complaints against CLARK and others.*

None of the parties to these suits in Ohio moved pursuant to 28 U.S.C. § 1407 to consolidate them into M.D.L. 55 until after the M.D.L. 55 settlement described below was concluded.**

The Trustee of the Four Seasons companies ("Trustee") also sued CLARK and other M.D.L. 55 defendants in a third set of parallel lawsuits alleging wrongs based on some

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* Ohio has also attempted to prosecute criminally several persons associated with the Ohio brokers, Crofters, Inc. and Dee-Gee Company, who served as finders in arranging the sale of the notes to Ohio. In each case, the defendants have been acquitted, once by an Ohio judge, and once by an Ohio jury. CLARK and seven other persons were indicted by a federal grand jury in the Southern District of New York on charges relating to the financial collapse of the Four Seasons companies. CLARK subsequently entered a narrowly limited guilty plea to an 18 U.S.C. § 371 conspiracy offense admitting only that he conspired to conceal certain information from the public in April 1970, after the Ohio loans were consummated. CLARK denied all other wrongdoing. All other charges against CLARK in the indictment were dismissed. CLARK's guilty plea statement, accepted by the district court and the prosecution as the factual basis supporting the plea of guilty, specifically denied any illegality regarding the Ohio loans.

** Although the *State of Ohio v. Crofters, Inc.* case pending in the United States District Court for the Southern District of Oklahoma had not been transferred to M.D.L. 55 when the district court rendered its opinion relieving Ohio from the operation of the class action judgment on June 11, 1974, the Judicial Panel on Multidistrict Litigation subsequently transferred the *Crofters* case to M.D.L. 55. *In re Four Seasons Securities Laws Litigation*, 361 F. Supp. 636 (J.P.M.L. 1973).

of the same transactions. These "plenary" suits were never consolidated into M.D.L. 55.

Ohio's assertion that "M.D.L. 55 was pending for 14 months before the District Court indicated its readiness to determine whether the actions could be maintained as class actions"* is misleading. When the consolidated lawsuits were transferred to Oklahoma, the district court was faced with numerous suits on behalf of overlapping classes. Pursuant to the wishes of all parties, the court supervised discovery pertinent to class action issues in preparation for hearings on a class action determination pursuant to Rule 23 (c) (1). Over a period of several months, extensive discovery resulted.** At the time of the hearings on motions for the class action determination plaintiffs' counsel had "a fairly extensive knowledge of just about everything that [they] could hope to prove, what defenses would be . . . and a fairly inclusive idea of what the whole case was about."***

In May, June and July 1972 the parties in M.D.L. 55 briefed and argued their class action positions.**** Counsel for certain plaintiffs argued that there should be one class comprised of all persons who purchased securities is-

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* Petition for Certiorari, at 15.

** Plaintiffs secured deposition or statement testimony from at least 15 witnesses, including the defendant CLARK, two of Four Seasons' attorneys, three of its accountants and the two top Walston executives who served on the Four Seasons Board of Directors. Plaintiffs' counsel also spent more than 50 whole man-days collecting and analyzing more than three full filing cabinets of documents. (J. A., II, 761-64).

*** Statement of Marvin Cherner, one of the counsel for class plaintiffs Sher and Ginsberg. (J. A., II, 763).

**** Two of the complaints, the Sher and Fetman complaints, ultimately designated class actions were filed on behalf of "all security purchasers" of the Four Seasons companies who suffered losses. (J. A., I, 180-82, 200-202).

sued by Four Seasons or related or affiliated companies.* Other plaintiffs' counsel had different formulations, which clearly included Ohio as a potential class member.**

The statements of position filed by the representative plaintiffs also contained numerous allegations that Four Seasons' conduct in connection with the Ohio loans was unlawful and constituted a ground upon which the classes could recover against the M.D.L. 55 defendants. For example, one class plaintiff alleged as a specific wrongful act "the failure to disclose and report finders fees and all the details of certain loan transactions among Nursing [Four Seasons], the State of Ohio, Financial Relations, Inc., and Crofters."

As a defendant in the cases ultimately certified as class actions, CLARK argued vigorously that these cases should not be allowed to proceed as class actions because the representative plaintiffs could not adequately represent all pur-

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* "The only practical solution is to consider all purchasers of securities, whether of Four Seasons America or Four Seasons Equity or other affiliates, to be considered as belonging to one and the same class. All such purchasers were misled and deceived by the same acts, practices and courses of conduct for which the Defendants herein are liable, and all should participate in any recovery on the same basis."

Supplement to Plaintiff Sher's Objection, Response and More Definite Statement of Class Claim and Further Statement with Respect to Certain Additional Matters, dated May 15, 1972.

** ". . . I suggested that the 'lawsuits' for class action notice purposes be broadly defined to include all securities claims made under any of the proposed class action suits. I respectfully suggest that by so doing everyone's rights will be protected *including the res judicata effect of any class determination.*"

Letter from Harry A. Young, Jr., counsel for class plaintiff Fetman, to the district court, dated July 14, 1972. (Emphasis added.)

chasers of all Four Seasons securities. Thus, early in this litigation CLARK took precisely the same position that Ohio now espouses. Specifically, CLARK argued that representation could not be adequate because members of the purported classes purchased different types of securities. CLARK also argued to the district court that the representation could not be adequate because different kinds of misrepresentations were allegedly made to different members of the classes. Likewise CLARK argued that some absent class members would undoubtedly prefer to pursue legal theories or seek remedies other than those sought by the representative plaintiffs. In so doing, CLARK cited to the district court substantially the same authorities relied upon by Ohio to support its inadequate representation claim in this case.*

After considering the arguments of CLARK and of other defendants opposing class action designation, and after weighing the representative plaintiffs' counterarguments at great length, the district court *rejected* CLARK's and other defendants' arguments and announced its intention to enter a class action designation order permitting the five actions

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* *Carlisle* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972); *Price* v. *Skolnik*, 54 F.R.D. 261 (S.D.N.Y. 1971); *Morris* v. *Burchard*, 51 F.R.D. 530 (S.D.N.Y. 1971); *Dolgow* v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971); *Moscarelli* v. *Stamm*, 288 F. Supp. 453 (E.D.N.Y. 1968); *Jacobs* v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D.N.Y. 1967); *Richland* v. *Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967); *Burstein* v. *Slote*, 12 Fed. R. Serv. 2d 577 (S.D.N.Y. 1968), cited by Ohio to support its inadequate representation argument in its Brief in Opposition to the Tenth Circuit were all cited by CLARK in his effort to avoid the designation of these cases as class actions in an earlier stage of this litigation. In addition CLARK, unlike Ohio noted the substantial authority to the contrary, including *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), a leading securities class action case.

to proceed on behalf of two classes.* Ohio was a member of one of the classes. (App. A77 n.28).

At that point the M.D.L. 55 parties advised the district court that serious settlement discussions were in progress. The court granted the parties time to pursue settlement. The M.D.L. 55 defendants conducted simultaneous negotiations with the M.D.L. 55 named class plaintiffs and the Trustee.** As the negotiations progressed the M.D.L. 55 defendants tentatively agreed to pay $7 million to the plaintiff classes in settlement of the representative actions and $1.5 million to the Trustee in settlement of the four plenary suits maintained by the Trustee against some of the M.D.L. 55 defendants. Although each settlement was conditioned upon judicial approval of the other, the two settlements—one with the Trustee and the other with the classes—were separate.

The negotiations between the M.D.L. 55 defendants and the Trustee affected Ohio. Ohio had filed appeals from the adoption and confirmation of the Trustee's Plan of Reorganization for the Four Seasons Companies. As a condition of their $1.5 million payment to the Trustee in settlement of the Trustee's parallel plenary suits, the M.D.L.

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* The district court allowed the class actions to proceed, at least for discovery purposes "upon a single conspiracy theory." *In re Four Seasons Securities Laws Litigation*, 58 F.R.D. 19, 38 (W.D. Okla. 1972). It is clear that Ohio, which alleges that it relied on annual and interim financial statements of Four Seasons, was as much a victim of this conspiracy (if it existed) as any other purchaser of securities issued by the Four Seasons companies. The district court recognized that under a single conspiracy theory, when the accuracy of the identical financial statements is at issue, purchasers of different kinds of securities sold in various public and private offerings could all be represented by the representative plaintiffs, whereas if separate alternative legal theories were pursued, the representative parties might be able to represent only specified subclasses. *Id.* at 38-39.

** The Trustee was not a party to any of the M.D.L. 55 cases. He had, however, brought separate plenary suits against CLARK and others on behalf of the Four Seasons debtor estates.

55 defendants insisted that the Trustee, as part of his settlement with Ohio, secure dismissal of its fraud claims against the M.D.L. 55 defendants in the *Crofters* case. (J. A., II, 551-52). This, the Trustee and his attorney were unable to do. Finally, on September 7-8, 1972, some of the counsel for the M.D.L. 55 defendants met with the attorney for the Trustee and representatives of Ohio to attempt to persuade Ohio to include in its settlement with the Trustee a release of claims against the M.D.L. 55 defendants.* (J. A., II, 563-65). Ohio refused to settle with the Trustee on the terms offered. (J. A., II, 576-77). After the September 7 meeting the M.D.L. 55 defendants agreed to settle with the Trustee even though he could not secure the desired release of claims against them from Ohio. (J. A., II, 565).**

It is apparent from Ohio's participation in these meetings that Ohio's Assistant Attorneys General were aware of on-going settlement negotiations in M.D.L. 55. They were, or should have been, aware that the on-going negotiations could affect Ohio's rights.

On September 21, 1972 the district court signed an order in M.D.L. 55 tentatively designating five of the actions as class actions on behalf of two classes of plaintiffs. Simultaneously, the court tentatively approved the $8.5 million cash settlement for submission to the classes.*** The Settle-

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* At no time on or before September 21 did the M.D.L. 55 defendants offer to make any payment to Ohio. (J. A., II, 586-87). The only consideration offered to Ohio was that offered by the Trustee.

** The Trustee concluded a separate settlement with Ohio which did not include a release of Ohio's claims against the M.D.L. 55 defendants. (J. A., II, 565-66).

*** In addition to the cash—$7 million of which was to be distributed to the plaintiff classes and $1.5 million of which was paid to the Trustee of the Four Seasons debtor estates in a separate settlement of the four plenary suits brought by him—certain defendants released claims against the Trustee or certain class members having a value in excess of $1.5 million.

ment Order provided for extensive notice (1) by certified mail to persons who were known to the parties because they had brought individual actions, (2) by regular mail to all persons whose name and address were known to the Trustee in the Reorganization Proceedings, and (3) by publication in the national edition of the *Wall Street Journal*. The Settlement Order further provided that any class member could request exclusion from the classes and that anyone affected could appear and be heard at the hearing to be held on the fairness, reasonableness and adequacy of the settlement. Finally, the Settlement Order warned that any member of either of the classes who failed to request exclusion from the classes would be bound by the orders of the court approving or disapproving the settlement whether or not such class member had previously maintained an individual action based on transactions in the securities of the Four Seasons companies.*

Ohio, as a purchaser of securities issued by Four Seasons and a member of one of the classes, was sent two separate notices by certified mail return receipt requested. The Ohio Attorney General's office received and signed receipts for separate, but identical, notices on October 6 and October 10, 1972. (App., II, 598). The notice labeled for the attention of certain purchasers of "securities or commercial paper" issued by the Four Seasons companies informed Ohio of its right to be heard at the settlement hearing as well as its right to request exclusion from the classes. Ohio did not request exclusion from the classes by the November 1, 1972 deadline; nor did it appear at the November 16-17 hearings on the fairness, reasonableness and adequacy of the settlement. The fact that Ohio was within the classes of plaintiffs embraced by the Settlement Order was specifi-

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* *In re Four Seasons Securities Laws Litigation*, 58 F.R.D. 19 (W.D. Okla. 1972) (App., A79-A85).

cally brought to the attention of the district court at the hearing on the proposed settlement.*

After the November 16, 1972 hearing, the district court "confirmed and made absolute, unconditional and final,"** its earlier tentative findings that (1) "the claims of the representative parties are typical of the claims of such class," and (2) "the representative parties in these class actions will fairly and adequately protect the interests of such class." (J. A., I, 220).

The settlement was approved and on November 30, 1972 and the district court signed a "Final Judgment Approving Settlement and Plan of Distribution and Dismissing Claims

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* "MR. MATHEWS: . . . CLARK was a party to the State of Ohio's petition in reclamation, and we have had a mini-trial of some of the issues in this case, and we have read a lot of accusations, the accusations are encompassed by the complaints in this case now and some of the same issues would be at issue here, and that was the case where the State of Ohio tried to challenge, amongst other things, the accounting methods utilized by Four Seasons, including accounting for franchise income and accounting for construction profits, and that is the case where the State of Ohio relied upon the SEC and its expert, James Eichstaedt, a C.P.A. attorney, to try to prove its case, and I don't mean to raise the issue of collateral estoppel, or any of that, I just want to raise the issue of the problems of trying a case like this. That matter was bitterly litigated in Judge Bohanon's courtroom here in Oklahoma City, the SEC expert witness didn't hold up after cross examination on the stand, the allegations made by the improper accounting were not proven, the Federal District Court found that *the State of Ohio, who falls within the classes here represented by the plaintiffs,* had not proven that they had been defrauded; and that was affirmed by the Tenth Circuit." (J. A., II, 771). (Emphasis added.)

** Final Judgment Approving Settlement and Plan of Distribution and Dismissing Claims with Prejudice. (J. A., I, 310). The Final Judgment confirmed the tentative finding of adequate representation only after specifically finding that notice had been given to the State of Ohio. (J. A., I, 304-306).

with Prejudice."* The Final Judgment, which was obviously intended to bind Ohio as an absent class member,** barred forever the prosecution of any and all claims which "have been or could be asserted by or on behalf of the classes . . . or any member thereof, arising out of or relating to any act or omission relating to [the Four Seasons companies] . . . or relating to the business, management or financial statements of any of the Four Seasons companies, or transactions in the *securities or commercial paper* of any of the Four Seasons companies . . . ."*** A copy of the Final Judgment was mailed to and received by Ohio.

As required by the terms of the Final Judgment, the contributing defendants, including CLARK, deposited $8.5 million in cash with the court-appointed Escrow Agent be-

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* This judgment was actually filed in the office of the Clerk of the United States District Court for the Western District of Oklahoma on December 4, 1972.

** The Final Judgment contained an *express finding* that notice has been sent to Ohio in its capacity as a party litigant in three lawsuits involving the Ohio loans to Four Seasons. Specifically, the Final Judgment stated that

> "[a]t the request of various defendants in the class actions who are also defendants in certain other actions relating to transactions in the *securities or commercial paper* of the Four Seasons Companies, the Trustee timely served by registered mail a copy of the order and its exhibits, including the notice annexed thereto, upon all named plaintiffs in the following actions:
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> • • •
>
> *"State of Ohio v. Crofters, Inc., et al.,* Civ-72-81 (United States District Court for the Southern District of Ohio);
>
> *"Shaul v. Crofters, et al.,* 72-CV-03-791 (Franklin County, Ohio, Court of Common Pleas);"

and upon third party plaintiffs entitled:

> *"State of Ohio v. John D. Herbert, et al.,* 72-CV-03-792 (Franklin County, Ohio, Court of Common Pleas)." (J. A., I, 304-05). (Emphasis added.)

*** Emphasis added.

tween December 4, 1972 and December 14, 1972. Ohio knew or should have known from the notices and Final Judgment received by it that the defendants were required to make such cash deposits.*

On December 21, 1972, after the Final Judgment had been entered and the M.D.L. 55 defendants had deposited $8.5 million with the court-appointed Escrow Agent, Ohio moved pursuant to Rule 60 (b) to be relieved from the operation of the Final Judgment.** Ohio argued that its failure to request exclusion from the classes was due to excusable neglect (under Rule 60 (b) (1)); that the Final Judgment was void as to Ohio because it had not been adequately represented by the class plaintiffs (under Rule 60 (b) (4)); and that the district court, in the exercise of its discretion under Rule 60 (b) (6), should relieve Ohio from the operation of the Final Judgment.

The district court found Ohio's claim for relief under Rule 60 (b) (1) to be without merit. It found that Ohio had received due notice of the class action determination and of the proposed settlement. Despite Ohio's urging the district court refused to find that every Ohio Assistant Attorney General working on Four Seasons matters had actually failed to read the Settlement Order and notice. Instead the district court held:

> "If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent." (App. A40).

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* The Settlement Order, two copies of which were received by Ohio, provided: "All cash contributions by or on behalf of the defendants to the Settlement Fund shall be made no later than ten (10) days after the later of the entry of the final judgment pursuant to paragraph 11 of this Order and the entry of the final judgment [settling the Trustee plenary suits]." (J. A., I, 227). Ohio received copies of both such final judgments.

** Ohio voluntarily relinquished any right that it might have had to appeal from the Final Judgment. (J. A., I, 365-66).

The district court determined that such negligence was *not* excusable. (App. A43).

The district court also declined to find Ohio's 60 (b) (4) assertion of denial of due process persuasive. It reviewed the securities law fraud allegations in Ohio's complaint against some of the M.D.L. 55 defendants and determined that such allegations were similar to those made by the representative plaintiffs in the class actions.* (App. A48).

Ohio challenged the plan of distribution as demonstrating that it was inadequately represented because its claim was reduced to 10% of the face amount to compensate for the extra amount which Ohio had received as a Class C creditor in the Reorganization Proceedings. The district court rejected this contention and reaffirmed its earlier finding that the plan of distribution was fair. (App. A48).

Finally, Ohio argued that through communications among the Trustee, his counsel, counsel for some of the M.D.L. 55 defendants and various representatives of the State of Ohio, Ohio had been lulled into the erroneous belief that it was not affected by the class actions or the settlement thereof. The district court found that neither the attorneys for the M.D.L. 55 defendants nor the Trustee made any misrepresentation or deliberately misled Ohio's attorneys.**

Nevertheless, on a finding that, through "unintentional and non-deliberate 'lulling'," Ohio had formed the false belief that it would be unaffected by the M.D.L. 55 class actions (App. A42), and that the M.D.L. 55 defendants ex-

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* The court did determine that Ohio's allegations against its own former State officers and their bonding companies in another action instituted by Ohio in Ohio state court involved claims which were not similar to those made by the representative plaintiffs in the class actions. (App. A48).

** The Court stated:

"The court does not suggest that the Trustee or his attorney or any of the M.D.L. 55 attorneys acted unfairly or in bad faith with respect to Ohio." (App. A50).

pected Ohio to opt out of the class actions (App. A41, A50), the district court decided to exercise its limited discretion under Rule 60(b)(6) to relieve Ohio from the operation of the Final Judgment.

CLARK and the other respondents appealed to the Tenth Circuit pursuant to 28 U.S.C. §§ 1291 and 1292(b).* The Court of Appeals carefully analyzed the opinion of the district court and concluded that "the real basis for the court's decision below, notwithstanding the analysis directed to particular clauses under Rule 60, was its belief that under all of the circumstances presented Ohio was simply denied due process of law." (App. A15). The Court of Appeals then held that since Ohio had received notice not only of the class designation but of the precise terms of the impending judgment, it had been afforded a unique opportunity to judge for itself whether it had been adequately represented.** Under these circumstances, the

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* In order to avoid any question concerning the appealability of an order granting relief under Rule 60(b), the respondents sought and obtained certification by the district court and permission for leave to appeal from the Court of Appeals under 28 U.S.C. § 1292(b). Respondents also filed notices of appeal under 28 U.S.C. § 1291.

** The Court of Appeals held:

> "[W]e consider here an action in which Ohio not only received notice of its inclusion within the designated class, with the concomitant right to opt out, but one in which Ohio was also apprised of the very terms of the impending judgment. It was thus presented with the unique opportunity of judging, retrospectively, whether its interests *had been* adequately represented at a time when it was capable of excluding itself if not satisfied . . . .
>
> "We are constrained to conclude that due process was satisfied here when Ohio received the notice and order delineating the terms of the proposed settlement and informing Ohio that it was a designated member of a class, that it had the opportunity to opt out or be represented by counsel, that it would be bound if it failed to opt out." (App. A18-A19).

Court of Appeals found that Ohio had been accorded due process, reversed the decision of the district court, and ordered that the class action settlement judgment entered December 4, 1972 be reinstated as to Ohio.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

SUMMARY

I

In a Rule 23 (b) (3) class action, notice reinforces the initial adequacy of representation finding made at the class designation stage. The district court, after months of extensive discovery and vigorous hearing, made the required finding of adequacy of representation at the class designation stage. Since Ohio, an absent class member, was afforded notice, an opportunity to be heard and the right to request exclusion through formal notice by certified mail return-receipt-requested, the procedures followed fairly insured protection for Ohio's interest. There was no departure from *Hansberry* v. *Lee* or *Eisen* v. *Carlisle & Jacquelin*.

II

The Tenth Circuit's decision is in accord with the express language of the Fifth Circuit's decision in *Gonzalez* v. *Cassidy*. Both courts recognize that the unique notice and opt-out provisions applicable to Rule 23 (b) (3) class actions require a different treatment of adequacy of representation questions than is required for (b) (1) or (b) (2) class actions.

III

The decision of the district court, which revived the threat of "one-way intervention" in Rule 23 (b) (3) class actions, severely undermined the finality of class action

judgments and discouraged class action settlements. The Court of Appeals recognized these hazards and corrected the error. No action by this Court is required.

IV

The procedures for notice followed in this case fully protected and even augmented the rights of absent class members. The reasons for the *Manual for Complex Litigation's* objection to the practice of combining notice for class determination under Rule 23 (c) (2) with the notice of settlement under Rule 23 (e) were not present. Furthermore, blind adherence to the Manual's recommendations may in some instances impede settlement of class actions.

V

The holding of the Tenth Circuit was fully in accord with the law governing Rule 60 (b). Relief may not be had under Rule 60 (b) (6) for reasons subsumed within but insufficient under the first five clauses of Rule 60 (b). Furthermore, Rule 60 (b) (6) is not applicable to a moving party who fails to demonstrate exceptional and extraordinary grounds for relief, whose situation is clearly the result of its own negligence, and who has little likelihood of success on the merits of his claim or defense.

PREFACE

Ohio has petitioned this Court solely to secure relief from its own inexcusable neglect: None of the several Assistant Ohio Attorneys General assigned to handle *Four Seasons* matters bothered to respond to the formal class action notice received by Ohio by certified mail return-receipt-requested. The notice received by Ohio and physically handled by at least two Assistant Ohio Attorneys General expressly gave Ohio the right (1) to enter an appearance through counsel; (2) to oppose the court's selection of representative parties; (3) to oppose the settlement proposed in the notice; or (4) to request exclusion from the

class actions altogether. However, Ohio in an exercise of *inexcusable neglect* ignored the notice. Thus, Ohio asks this Court to jeopardize the finality of class action judgments and impede the settlement of complex multi-party, multi-district litigation by holding that the Attorney General of Ohio or his Assistants, unlike all other litigants, need not read their certified mail.

Point I

THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH RULE 23 AND THE APPLICABLE DECISIONS OF THIS COURT.

Ohio argues in its Petition that the Court of Appeals has effectively written the adequacy of representation requirement out of Rule 23 (b) (3) class actions, thereby violating Rule 23, ignoring *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and sidestepping dicta in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 (1974). Ohio's arguments collapse under careful analysis.

None of the parties to this controversy disputes that Rule 23 requires a finding of adequacy of representation at the stage of the proceeding at which the district court determines under Rule 23 (c) (1) that the case may be maintained as a class action. That finding was made in this case. It was tentatively made on July 20, 1972, after vigorous argument, when the district court announced its decision to maintain the actions as class actions. A formal, but still tentative, finding of adequacy of representation was made in the September 21, 1972 class designation and settlement order. Then after notice to the class, including notice by certified mail return-receipt-requested to Ohio, a hearing was held on adequacy of representation. After the day-long hearing at which the adequacy of representation question was again hotly contested, the district court "confirmed and made absolute, unconditional and final," its earlier tenta-

tive findings that (1) "the claims of the representative parties are typical of the claims of such class," and (2) "the representative parties in these class actions will fairly and adequately protect the interests of such class." (J.A., I, 220).

Rule 23 also carefully defines the scope of the judgment in a Rule 23 (b) (3) class action, such as the class actions in the instant case. The rule provides that in the case of a (b) (3) type action:

> "The judgment . . . whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and have not requested exclusion, and whom the court finds to be members of the class." Rule 23 (c) (3).

Moreover, the advisory committee notes to Rule 23 provide:

> "The judgment in a class action maintained as such to the end will embrace the class, that is, . . . in a class action under subdivision (b) (3), those to whom the notice prescribed by subdivision (c) (2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class."*

The draftsmen of the 1966 amendments to Rule 23 gave binding effect to notice because they recognized that it afforded absent class members an opportunity to object to the selection of the representative plaintiff and to challenge the adequacy of his representation. Thus, the advisory committee notes specifically recognize that "[n]otice has gone to members of a class so that they might express any opposition to the representation" and that notice may be "par-

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* Advisory Committee Notes to the 1966 Amendments to Rule 23—Subdivision (c) (3)—Effect of Judgment.

ticularly useful and advisable in certain class actions maintained under the subdivision (b) (3), for example, to permit members of the class to object to the representation."*

Since 1966 the federal courts have repeatedly enforced class action judgments against those who received notice. *Mungin* v. *Florida East Coast R.R.*, 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971), involved an attempt by class members, like Ohio, who had not responded to notice or appeared at a settlement hearing, to seek relief from a judgment entered pursuant to a class action settlement. The court held:

> "At the time the Court ordered the giving of notice, there was no evidence before the Court of any type of dissension among the class nor or any lack of cohesiveness or unity in the class nor any evidence to indicate that the representation of the class was ineffective . . . . *The Court finds that both timing and content of the notice of final hearing was sufficient to apprise all members of the class of the matters involved in the March 11th hearing, and to put them on actual, or at the very least, binding constructive notice of such matters and complied with Rule 23. Any failure thereafter by them to make further investigation cannot be any basis for relief from the judgment.*" *Id.* at 733-34. [Emphasis added.]

Similarly in *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), the court held absent class members to the terms of notices they received. The court stated:

> "Members of a class, having had full notice of the proceedings and an opportunity to seek the advice of a

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* *Id.*—Subdivision (d) (2)—Notice. Rule 23 (c) (2) expressly provides that the notice in a class action maintained under (b) (3) must advise that "any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

> lawyer of their own choosing and not having availed themselves of that opportunity, may not ignore the advice of qualified counsel for the class and later complain about the advice given." *Id.* at 1006.

Numerous other federal courts have also strictly enforced the terms of the class action notices against absent class members. *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Rivera* v. *Chicken Delight, Inc.*, 17 Fed. R. Serv. 2d 473 (S.D. Tex. 1973); *Supermarkets General Corp.* v. *Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973), *aff'd sub nom. Manhattan-Ward* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974); *Research Corp.* v. *Edward J. Funk & Sons Co.*, 15 F.R. Serv. 2d 580 (N.D. Ind. 1971); *Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co., Inc.*, 69 Civ. 5559 (S.D.N.Y. 1970) (unreported); *United States* v. *American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951). *See Greenspun* v. *Bogan*, 492 F.2d 375 (1st Cir. 1974).

In short, the current law under Rule 23(b) (3) is that absent class members "are compelled when in receipt of notice under Rule 23 (c) (2) to make a binding decision within a short time"* and where a class member "simply *ignores* the notice, whether by intention or by inadvertence, it becomes, by inaction alone, a member of the class to be bound by the judgment."** The Tenth Circuit in the instant case correctly applied the law as stated above.

Neither these principles nor the decision below is inconsistent with *Hansberry* v. *Lee*, 311 U.S. 32 (1940). *Hans-*

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* *State of Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559, 575 (D. Minn. 1968).

** *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 (E.D. Pa. 1967). "The fundamental structure of the (b) (3) class action under Rule 23 is that all class members are bound who do not request exclusion." *B&B Investment Club* v. *Kleinert's, Inc.*, 18 Fed. R. Serv. 2d 746, 753 (E.D. Pa. 1974).

berry concerned the inequity of binding an absent class member to a judicial decision when he was neither adequately represented nor cognizant of the existence of legal proceedings directly affecting his rights. The black plaintiffs in *Hansberry* were members of a class of persons opposing the binding effect of a racially restrictive agreement. In an earlier litigation, in which all the contestants had an overriding interest in establishing the validity of the racially restrictive agreement, a crucial issue of fact was decided. It was the *res judicata* (or collateral estoppel) effect of this factual determination which was challenged by the plaintiffs in *Hansberry*. Not surprisingly, this Court held that the binding of the *Hansberry* plaintiffs to the earlier decision would violate the requirements of due process since they had neither notice of, nor opportunity to participate in, the earlier proceeding and none of the parties thereto had represented their position. The test applied by this Court was whether the "procedure adopted [by the decision-rendering court], fairly insure[d] the protection of the interests of absent parties who [were] to be bound by it." *Id.* at 42.

There can be no doubt that the procedures employed in the instant class actions (unlike those in *Hansberry*) "fairly insure[d] the protection of the interest" of Ohio. In *Hansberry*, the absent class members had interests directly adverse to those who purportedly represented them. In the instant case the interests of Ohio were virtually identical to the interests of the class representatives—each sought to prove that its investment was made as a result of false Four Seasons financial information. Neither the district court nor the Court of Appeals has ever found Ohio to have been inadequately represented. Indeed, the district court expressly found the claims of the representative plaintiffs typical of most of Ohio's claims. (App. A48). In *Hansberry*, the earlier proceeding that purportedly bound absent "members" was not perceived to have been a class action until well after its conclusion. In the instant

case, after extensive hearings, and nearly four months before the Final Judgment bound Ohio, the trial judge determined the action to be a class action in which Ohio was a class member. Ohio has never challenged the validity of that determination.

In *Hansberry* no notice whatever was given to absent class members. In the instant case, Ohio, was notified of the class determination and the proposed settlement by certified mail, return receipt requested.* Representatives of the Ohio Attorney General signed receipts for two copies of the class action notice and Settlement Order almost two months before the Final Judgment was entered. An Ohio Assistant Attorney General was told of the settlement the day after the Settlement Order was signed. And two different Ohio Assistant Attorneys General actually handled the Settlement Order and notice within the period for requesting exclusion. One of them read at least the first page of the Settlement Order before filing it.

In short, the procedure employed in this case provided Ohio with far more than the "fundamental requisites of

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* Professor Kaplan in commenting upon the relationship between *Hansberry* and the 1966 amendments to Rule 23 stated:

> "It was plausible to suppose that where claimed inadequacy of representation was the nub of a collateral attack on a class judgment, the question whether members had been informed of the action and thereby had a chance to object to the representation would be distinctly relevant. Informal notice might be thought owing to the class members as a matter of 'common decency' quite apart from any constitutional necessity. But further, at least where the homogeneity or 'solidarity' of the class was open to some question, notice could bear directly on a court's authority to render a judgment with full binding effect on the class." B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*, 81 Harv. L. Rev. 356, 379-80 (1967). (Footnotes omitted.)

the constitutional guarantee of procedural due process."* Ohio had not only notice and an opportunity to be heard but was also informed of the precise terms of the impending judgment at a time when it could request exclusion if dissatisfied.

The Tenth Circuit did not, as Ohio suggests, eliminate the requirement for adequacy of representation from (b) (3) type class actions.** Rather the Court of Appeals recognized that the role played by adequacy of representation in a (b) (3) type class action depends in part on the *stage* of the proceedings. Its holding is entirely consistent with this Court's holding in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974). In *Eisen* this Court emphasized the critical importance of notice to absent class members in a Rule 23 (b) (3) class action. It held again, as in many previous cases,*** that notice and an opportunity to be heard were the touchstones of due process. Ohio, ignoring the holding and essence of *Eisen*, has plucked from it the single sentence that: ". . . Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *Id.* at 2152.

By lifting this sentence from the context of the *Eisen* opinion *which dealt with the class action designation stage* of a Rule 23 proceeding, Ohio argues that the decision below is inconsistent with *Eisen*.

The import of the Tenth Circuit's decision is to recognize that when the requirements of sections (a) and (b) of Rule 23 have been fully followed at the class designation

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* *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2150 (1974).

** Indeed, the Tenth Circuit cited and embraced this Court's dicta in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 (1974), that "Rule 23 speaks to notice as well as to adequacy of representation and requires both to be provided." (App. A18 n.11).

*** *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

stage, when the absent (b) (3) class members have had notice and an opportunity to appear, and the defendants have relied upon the Final Judgment of the district court by depositing funds for payment to the class, there is a balance between adequacy of representation and notice in the (b) (3) type action.* In short, proof that the absent class member received notice and had the "unique opportunity of judging, retrospectively, whether its interest *had been* adequately represented at a time when it was capable of excluding itself" satisfied due process.

Point II

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE FIFTH CIRCUIT DECISION IN *GONZALES* v. *CASSIDY*.

In its Petition, Ohio asserts that the decision in the instant case is in conflict with *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973). To construct this "conflict" Ohio ignores not only the sharp factual disparities between the cases but also the express language of both opinions.

Gonzales concerned the binding effect on absent class members of a judgment in a Rule 23 (b) (2) (not (b) (3)) class action—a type of Rule 23 class in which the absent class members are not necessarily entitled to notice and in which they have no right to request exclusion. In *Gonzales*, the Fifth Circuit held that an absent member of the (b) (2) class in a previous action had not been adequately represented because the class representative, having secured

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* The commentators have generally recognized that notice reinforces adequacy of representation.

> "When there is actual notice and an opportunity to be heard in a class or representative suit, adequacy of representation is immaterial in determining whether due process has been satisfied; the actual notice fulfills the requirements, just as it would in any other action."

F. Maraist and T. Sharp, *Federal Procedure's Troubled Marriage: Due Process and Class Action*, 49 Tex. L. Rev. 1, 9 (1970).

prospective relief from unconstitutional provisions of the Texas motor vehicle code, had failed to appeal the district court's denial of relief (retrospectively) to the vast majority of the class purportedly represented. The Fifth Circuit noted that a close scrutiny of adequacy of representation was required because *Gonzales* involved a (b) (2) type of class action:

> "One distinction between members of a class in a (b) (1), (b) (2), or (b) (3) action is that absent (b) (1) and (b) (2) members do not have the privilege of opting out of the suit that is accorded to class members in a (b) (3) suit. See *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (9th Cir., 1970); *Smith* v. *Alleghany Corp.*, 394 F.2d 381 (2nd Cir., 1968); Moore, ¶ 23.60 at 1202. Also, the mandatory notice requirements of 23 (c) (2) do not apply to (b) (1) and (b) (2) actions even though the discretionary notice provisions of (d) (2) are applicable. As a result of these distinctions class members in (b) (1) and (b) (2) actions must necessarily rely on the representative to protect their interests." 474 F.2d at 74 n.12.

Thus, the *Gonzales* court recognized, as did the drafters of Rule 23,* that the opting-out and mandatory notice provisions of the (b) (3) proceeding make it less likely that a (b) (3) class member will be committed to a representative deemed inadequate for his purposes than would be the case in a (b) (1) or (b) (2) type of class suit.** In other words

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* The drafters of Rule 23 recognized that notice provided absent class members with an opportunity to object to the selection of the representative plaintiff and to challenge the adequacy of representation. See pages 19-20, *supra*.

** The judgment in a (b) (1) or (b) (2) type action binds all class members, while the judgment in a (b) (3) type action binds only class members "to whom the notice . . . was directed and who have not requested exclusion." Rule 23 (c) (3).

the unique and rigorous notice provisions of Rule 23 (b) (3),* while not a substitute for adequate representation, do place some of the burden for judging adequacy of representation upon the absent class members who are most familiar with their own particular claims.

In the instant case, the Tenth Circuit arrived at the same conclusion and placed part of the burden of preserving its own interests upon Ohio. No class member could have been in a better position for judging the adequacy of representation afforded to it than Ohio, which was informed of the precise terms of the impending judgment.

Indeed, the absence of a conflict between the present case and *Gonzales* can be seen not only from the express qualification in the *Gonzales* opinion but also in the Tenth Circuit's careful discussion of the *Gonzales* case. (App. A17 n.9).

Point III

THE COURT OF APPEALS RECOGNIZED THAT THE DISTRICT COURT'S DECISION UNDERMINED THE ADMINISTRATION OF RULE 23.

The Court of Appeals recognized that the district court's decision sharply undermined the finality of class action judgments and properly corrected the lower court's clear

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* Ohio's quotation from *Gonzales* at page 12 of its Petition is misleading. In *Gonzales* no notice was sent to the absent class members, but the defendants nevertheless argued that those who accidentally learned of the decision in that case in time to appeal were not entitled to Rule 60 (b) relief. The *Gonzales* court never intended to say that absent class members were free to ignore official court approved notice. On the other hand, the Second Circuit has held that even informal communications put absent class members represented by counsel "on notice that a settlement was in the making and imposed on them a duty of diligence to keep abreast of developments." *Manhattan-Ward, Inc.* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974).

error. Rule 23 was amended in 1966 to prohibit the practice of "one-way intervention" which had grown up under the original Rule.* Under this practice the so-called "spurious" class action was allowed to go to judgment without first determining who would be bound by the judgment. If the defendant lost, absent class members could enjoy the benefits of the judgment; if the defendant won, the absent class members could avoid the judgment and relitigate their claims.

The effect of the district court's opinion here was to revive "one-way intervention." In most Rule 23 (b) (3) type classes, there are differences among the claims of the various class members, but representatives are nevertheless permitted to litigate class claims because the claims of the representative parties are "typical" and the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Rule 23 (a). However, when a class action is permitted to proceed on the "typical" claims or the "common" questions, an absent class member can almost always demonstrate that his particular claim is somehow different and that he was therefore inadequately represented. To avoid this problem, which is particularly acute in securities cases,** the drafters of the amended Rule 23 required notice and

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* Advisory Committee Notes to the 1966 Amendments to Rule 23—Subdivision (c) (3)—Effect of Judgment.

** Virtually every class member in every securities fraud class action has some claims which are peculiar to him. Few purchasers buy securities directly from an issuer. In a case of the magnitude of the *Four Seasons Securities Laws Litigation,* involving actively traded exchange-listed, as well as privately placed, securities, there may be thousands of different sellers involved, i.e., virtually every broker and dealer in the United States. Each of these sellers may have made different representations to different purchasers. Moreover most states have their own state securities or "blue sky" law. In almost every instance where a federal securities law claim can be made, there can be a parallel state law claim. The timing of transactions may vary over a number of years. For example, the settlement

provided that the judgment would bind those absent class members "to whom notice . . . was directed, and who have not requested exclusion." Rule 23 (c) (3). In short, notice was made to reinforce the original adequacy of representation determination.

In the instant case, the district court allowed Ohio to reopen and reargue the question of adequacy of representation even though Ohio had received notice of and had failed to appear at the hearing held for the purpose of testing adequacy of representation. And the district court gave no weight whatsoever to the fact that the defendants had paid $8.5 million in reliance on the judgment.*

Because the district court's decision so severely undermined the finality of class action judgments, it was subject to scholarly criticism before the Tenth Circut reversed.

> "The liberal de novo review that was applied in *Research Corp.*, *Gonzales*, and *Four Seasons* ignores important policies underlying the class action device and may create substantial impediments to its effective operation. To facilitate successful challenges to the binding effect of class action judgments is to create a post-judgment election to opt out—'a return to one-way

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below covered purchases from May 9, 1968 to July 22, 1970. Economic conditions change over the course of time and may create claims unique to particular class members who purchased in the wake of particular events. In short, the fact that Ohio had some claims which were peculiar to it leaves Ohio in no different position than any other member of the settling classes.

* Compare District Judge Wyatt's statement in the $100,000,000 settlement in the drug litigation:

> "It is, however, important for the administration of justice that each order approving the proposed compromise and each judgment dismissing an action against defendants be final before any attempt is made to distribute the settlement amounts." *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 748 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

> intervention under a new guise.' Defendants might thus be placed in the position of having gone through complex and expensive class action litigation only to be forced to relitigate the entire controversy against parties that would have participated in the judgment if it had been favorable to them. Moreover, there is the irony that those attacking the judgment may rely successfully on the same arguments that failed when made by defendants to contest maintenance of the suit as a class action in the first place." Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589, 601 (1974). (Footnotes omitted.)

Fortunately the Tenth Circuit recognized the district court's error and corrected it, noting:

> "The purpose of class actions is to avoid multiplicity of suits and upholding the decision of the [district] court below would frustrate not only the interest in finality of judgments but also the interest in settlement of complex litigation." (App. A19).

There is no need for this Court to take any further action.

Point IV

THE NOTICE PROCEDURES FOLLOWED BY THE DISTRICT COURT IN THIS CASE WERE EXEMPLARY.

Ohio argues that the district court erred in combining the class action notice under Rule 23 (c) (2) with the settlement notice under Rule 23 (e). The only support offered for this position is the 1973 edition of the *Manual for Complex Litigation*.*

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* The portions of the Manual relied upon by Ohio were first adopted in January 1973, after the final class action judgment in this case was entered.

None of the evils condemned by the *Manual* were present in this case. There was extensive discovery and vigorous evidentiary hearings were conducted in the district court on the class action issues, including the adequacy of representation question. The district court announced its formulation of the appropriate classes and its appointment of class representatives before it was informed of serious settlement prospects. There was extensive information available to the court and the parties concerning liability, damages, and the expense of trial preparation and trial. Absent class members were afforded an opportunity to challenge the adequacy of the representative plaintiffs and did do so.

Significantly, there were valid reasons why the class action notice and the settlement notice had to be combined. At the time the district court completed the preliminary class determination discovery, held extensive hearings on the appropriate classes and announced its findings and conclusions on the class action issues, the parties were relatively close to settlement.* The court was then faced with two options—(1) send out the class notice and force the absent class members to commit themselves (by requesting exclusion or remaining in the classes) without knowing the terms of the possible settlement; or (2) delay the notice for a reasonable period so that the settlement terms could be finalized and communicated to absent class members who could then make a fully informed and intelligent decision. The district court properly elected the second option.

Since the *Manual* fails to provide an acceptable solution for this particular situation, its recommendations have not found wide acceptance. Indeed, the Second Circuit recently

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* Ohio paradoxically criticizes the district court for the delay in arriving at its decision on class action designation in an extremely complex multi-party, multi-class case, while citing the *Manual's* recommendation for evidentiary hearings on the class designation issues.

criticized these provisions of the *Manual* and refused to recognize them as absolute rules. The court stated:

> "It must also be remembered that these recommendations were not meant to be intractable rules. If they were applied blindly and without an appreciation of their implicit limitations in given circumstances, they might well jeopardize the right of many plaintiffs to recovery and even invite the likelihood that certain class action suits might never be settled at all." *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 466 (2d Cir. 1974).

Moreover, in appropriate circumstances with proper safeguards, such as those applied by the district court in this case, combined class action and settlement notices have been approved by numerous courts. For example, a combined settlement and class designation notice was approved by the district court in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364 (E.D. Pa. 1970), on the grounds that the procedure provided maximum protection for the absent class members. When the Third Circuit considered the same settlement in a related case, it observed that the combined notice procedure so effectively protected the rights of the absent class members that "there may be less need to police [such] settlements, since the question of fairness is left to the informed choice of the class members." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971).

This court should not grant certiorari for the purpose of attempting to prescribe in detail the complex and often difficult decisions a trial judge must make in his handling of complex class litigation. Moreover, it would clearly be inappropriate to apply any new procedural rules to complex litigation settled before publication of the new rules.

Point V

THE TENTH CIRCUIT FOLLOWED ESTABLISHED PRINCIPLES OF LAW IN OVERTURNING THE DISTRICT COURT'S DECISION TO GRANT OHIO RELIEF UNDER RULE 60(b)(6).

As indicated above, the district court's decision constituted a serious abuse of discretion that dangerously undemined the finality of class action judgments. It was therefore properly overturned by the Court of Appeals. The decision of the Court of Appeals is also in accord with the law governing the application of Rule 60 (b).

Relief should be granted under Rule 60 (b) (6) only if the gravamen of the movant's complaint does not come within one of the first five clauses of Rule 60 (b), *Klapprott* v. *United States,* 335 U.S. 601, 614-15 (1949), and the movant's circumstances are found to be exceptional, even extraordinary, *Ackermann* v. *United States,* 340 U.S. 193 (1950). Rule 60 (b) (6) relief is not to be granted to movants whose circumstances result from their own carelessness. *Carrethers* v. *St. Louis-San Francisco R.R.,* 264 F. Supp. 171 (W.D. Okla. 1967). Rule 60 (b) "cannot be used to avoid the consequences of a party's decision to settle." *Sampson* v. *Radio Corp. of America,* 434 F.2d 315 (2d Cir. 1970). Finally the movant's underlying claim must be meritorious. *Crane* v. *Kerr,* 53 F.R.D. 311 (N.D. Ga. 1971). Under these precedents, the Tenth Circuit correctly reversed the district court.

First, Ohio's only real ground for relief falls under Rule 60 (b) (1) and no other subdivision of Rule 60 (b). Every complaint made by Ohio can be traced to its failure to read its certified mail. The district court found that the failure of the Ohio Attorney General's office with 160 attorneys (at least 10 of whom had some responsibility for *Four Seasons* matters) to read certified mail from a United States District Judge was not excusable neglect. That decision is so plainly correct that Ohio does not now contest it. Yet, somehow, the district court turned a losing case under Rule

60 (b) (1) into a winning case under Rule 60 (b) (6). That was error. *Klapprott* v. *United States*, 335 U.S. 601, 614-15 (1949). *See also Transit Cas. Co.* v. *Security Trust Co.*, 441 F.2d 788 (5th Cir. 1971); *Crane* v. *Kerr*, 53 F.R.D. 311 (N.D. Ga. 1971).

Second, Ohio's circumstances were not exceptional or extraordinary. Ohio was an absent member of a class action. Like hundreds of thousands of other absent class members in cases in every district court in the Nation, Ohio received a notice which defined its rights. There is nothing exceptional or extraordinary in the fact that Ohio was held to the terms of the notice. The same result has obtained in many others cases.* Indeed, Rule 23 (b) (3) class action notices must be enforced, if Rule 23 is to remain viable.

Third, Ohio's situation is clearly the result of its own carelessness and negligence. As the district court held: "If the order was not read, one or more of Ohio's attorneys were negligent; if it was read, and not acted upon, they were equally negligent." (App., A40). But such negligence or carelessness by the movant has generally been held to preclude Rule 60 (b) relief. In a recent case involving a derivative class, the First Circuit held:

> "Rule 60 (b) of the F.R. Civ. P. is a remedial rule which normally receives a liberal construction from

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* *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *Research Corp* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Rivera* v. *Chicken Delight, Inc.*, 17 Fed R. Serv. 2d 473 (S.D. Tex. 1973); *Supermarkets General Corp.* v. *Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973), *aff'd sub nom. Manhattan-Ward* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974); *Research Corp.* v. *Edward J. Funk & Sons Co.*, 15 F.R. Serv. 2d 580 (N.D. Ind. 1971); *Mungin* v. *Florida East Coast R.R.*, 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd.* 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971); *Alpirre Pharmacy, Inc.* v. *Chas. Pfizer & Co., Inc.*, 69 Civ. 559 (S.D.N.Y. 1970) (unreported); *United States* v. *American Optical Co.*, 97 F. Supp. 66 (N.D. Ill. 1951).

> courts concerned that cases not be decided in default against parties who are inadevertently absent . . . . [Citations omitted.] But the liberal construction is usually reserved for instances where error is due to failure of attorneys or other agents to act on behalf of their clients, not where the client's own internal procedures are at fault . . . . [Citation omitted.] Moreover, in a derivative action such as this, where the party claiming the benefit of the rule is one member of a large class who received notice, an indulgent construction of the rule might unduly protract settlement proceedings. This suggests that 60 (b) relief should rarely be given to any member of the class whose failure to appear at a hearing is due to mistake bordering on carelessness, or carelessness itself." *Greenspun* v. *Bogan*, 492 F.2d 375, 382 (1st Cir. 1974).

Finally, Ohio has previously tried unsuccessfully to prove its fraud claims on the merits. It therefore lacked the meritorious claim which is a prerequisite to Rule 60 (b) relief. After a full hearing on the merits, in which CLARK participated, upon Ohio's Petition for Reclamation in the Four Seasons Chapter X proceedings the court found:

> "There is no intimation in this record that Four Seasons defrauded the State of Ohio or made any misrepresentations to the State of Ohio, but at all times dealt above board and submitted all information requested and withheld nothing. Mr. Gardner [the Deputy Treasurer of the State of Ohio] made no reliance upon any alleged fraudulent document or statement made by the debtor corporation [Four Seasons], its officers or agents, and no fraud here exists, and no misrepresentations were made to the State of Ohio, or others." *In re Four Seasons Nursing Centers of America, Inc.*, 329 F. Supp. 647, 651-52 (W.D. Okla. 1971).

This decision was affirmed by the Tenth Circuit:

> "We likewise reject appellant's [Ohio] argument that the prime rating relied upon by the Ohio State Treasurer in making these loans was obtained through Four Seasons' materially false statements concerning its financial status. The trial court found no fraud or misrepresentation after an evaluation of the testimony presented before it in a full hearing. We hold this decision to be adequately supported by the record; there is no cogent reason to reverse the trial court on this point. Accordingly, we affirm the finding of no fraud or misrepresentation in obtaining the rating of prime from the National Credit Office." *State of Ohio* v. *Four Seasons Nursing Centers of America, Inc.*, 465 F.2d 25, 28 (10th Cir. 1972).*

Despite Ohio's failure to secure reclamation of its $4 million loan from the Trustee of the Four Seasons companies, Ohio has already recovered a substantial amount of the loans at issue. Ohio has received $1,375,000 in cash, an additional cash dividend of $195,000 and approximately 388,000 shares of stock in the presently viable company into which the Four Seasons companies were reorganized (ANTA Corporation). The stock has a book value of more than $6.00 per share, and Ohio admitted in the district court that the stock had a market value of at least $3.00 per share. Thus, Ohio has already recouped between $2,734,000 and $3,898,000 of its $4 million investment.

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* CLARK argued to the district court in a summary judgment motion that, applying the principles of *res judicata* and collateral estoppel, these decisions bar Ohio's present claims. The district court rejected the *res judicata* argument, and held that the application of collateral estoppel as to each particular claim of Ohio must be determined upon the record developed at trial, not upon summary judgment. *In re Four Seasons Securities Laws Litigation*, __F.R.D.__ (W.D. Okla. 1974). The two decisions rejecting Ohio's fraud-based reclamation petition, nevertheless, establish the weakness on the merits of Ohio's fraud claims now at issue.

In these circumstances, the decision of the Tenth Circuit was correct and proper.

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 6, 1974

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Supreme Court of the United States

October Term, 1974
No. 74-379

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Petitioner,

vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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The briefs of Respondents are directed substantially and, in the case of Clark, primarily at the merits of the issues raised by Ohio and not to the importance of a resolution of them by this Court. This focus on the merits underscores the "certworthy" quality of the issues presented by Ohio's Petition. A statement of Ohio's arguments on the merits would be inappropriate at this time. Yet, one point in the Clark Brief in Opposition warrants clarification.

Clark urges that the denial of Ohio's Petition for Reclamation in the Four Seasons Chapter X reorganization

shows that Ohio lacks a meritorious claim justifying relief under Rule 60(b). Clark Opp. Br. pp. 35-36. Only in a footnote does Clark mention that the District Court overruled his Motion for Summary Judgment based upon the res judicata and collateral estoppel effects claimed to flow from the denial of Ohio's reclamation petition. *Id.* at p. 36. Contrary to the intimation of that footnote, the opinion of the District Court on Clark's motion has been reported. It is found at 370 F. Supp. 219 (W.D. Okla. 1974). An attempted interlocutory appeal from this decision by Clark under 28 U.S.C. §1292(b) was rejected by the Tenth Circuit. In re Four Seasons Securities Laws Litigation, Misc. No. 74-8031 (10th Cir. entered March 13, 1974).

The res judicata branch of Clark's Motion for Summary Judgment was denied on the ground that the proceedings upon Ohio's Petition for Reclamation were in rem and therefore not supportive of res judicata in a later action in personam. 370 F. Supp. at 232. The court further held that Ohio was not precluded by collateral estoppel from prosecuting its federal securities laws claims against Clark, but without prejudice to Clark's right to raise a collateral estoppel argument at trial as to any questions of fact determined by the Tenth Circuit on Ohio's reclamation petition. 370 F. Supp. at 238.

To support his view, Clark quotes at some length from Judge Bohanon's opinion denying Ohio's Petition for Reclamation. Clark Opp. Br. p. 35. That quotation must be placed in context by Judge Bohanon's later statements. In his remarks on November 2, 1971, not included in his later written opinion, after a hearing upon allowance of certain claims in the reorganization proceedings, Judge Bohanon said:

"The Court now has before it the problem first of whether or not Equity and Four Seasons were in effect one and the same. They worked together, as a joint adventure, helping one another, and helping Jack Clark and his robbers, and that is what they were—nothing short of just rob the American people." App. pp. A27-A28.

The decision of Judge Bohanon upon Ohio's Petition for Reclamation cited by Clark was rendered July 14, 1971. The broad assertions then made of no wrongdoing by Four Seasons' personnel are plainly inconsistent with Judge Bohanon's later description of Respondent Clark. The opportunities for Ohio to establish its claims on the merits are open, subject only to the limitations of collateral estoppel upon such factual issues as may have been determined by the Tenth Circuit.

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